VOTING RIGHTS ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112

BILLS TO AMEND THE VOTING RIGHTS ACT OF 1965

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APPENDIX

PART 1.—EXECUTIVE SESSIONS CONSIDERING THE VOTING RIGHTS ACT

WEDNESDAY, MARCH 24, 1982

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 3:47 p.m., in room 2228, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senators Thurmond, Grassley, and DeConcini.

Staff present: Stephen Markman, chief counsel; Peter Ormsby, professional staff member; William Lucius, counsel; Dennis Shedd, counsel, Claire Greif, chief clerk; and Sharon Peck, clerk.

Senator HATCH. We will call the subcommittee to order.

The Subcommittee on the Constitution this afternoon meets in executive session to consider legislation to extend the Voting Rights Act of 1965. The subcommittee has conducted 9 days of what I believe have been thorough and balanced hearings on the subject of the Voting Rights Act.

I would like to focus very briefly on the issue that I believe has emerged as the single most critical issue in this debate. That, of course, is the question of the proposed House amendments to section 2 of the act. Section 2 is a restatement of the fifteenth amendment to the Constitution and has always required proof of purpose or intent to discriminate in order to establish a violation. The House-proposed amendment would substitute a new test that focuses upon disparate election "results" among minority groups.

In my view, as I have expressed many times during subcommittee hearings, this proposed change involves one of the most substantial constitutional issues ever to come before this body. Both the constitutional and practical implications of this proposed change are enormous. By concentrating upon equal election results rather than equal election access, the proposed amendment would utterly redefine the notions of civil rights and discrimination while placing in jeopardy of judicial restructuring of hundreds, perhaps thousands of communities, across this Nation.

Since I have already spoken until I am blue in the face on the truly radical notion of proportional representation for minority-groups-elected legislative bodies, I would like to bring several other parties into this debate. If I am describing things inaccurately or distorting issues or mischaracterizing this whole matter, then I would respectfully suggest that I have been in some pretty distinguished company. The Supreme Court of the United States, for instance, has described the "results" test proposed by Justice Thurgood Marshall in his dissent in the case of *Mobile* v. *Bolden* in the following manner:

> The theory of the dissenting opinion appears to be that every political group or at least every such group that is in the minority has a Federal constitutional right to elect candidates in proportion to its numbers. The Equal Protection Clause does not require proportional representation as an imperative of political organization.

That is the Supreme Court speaking about the results test.

The report of the House Judiciary Committee on its voting right measure states:

> The fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population would be highly relevant under the proposed amendment.

That is the House report on this measure.

The Attorney General of the United States has said:

> Under the new test any voting law or procedure in the country which produces election results that fail to mirror the population's makeup in a particular community would be vulnerable to legal challenge. If carried to its logical conclusion, proportional representation or quotas would be the end result.

Prof. William Van Alstyne, one of the most distinguished constitutional scholars in the country and a long-time member of the board of directors of the American Civil Liberties Union has remarked:

> The results amendment must invariably operate to create racially defined wards throughout much of the Nation and to compel the worst tendencies toward race-based allegiances and divisions.

The Washington Post indeed remarked in an editorial following the *Mobile* decision less than 2 years ago:

> The logical terminal point of the challenge to *Mobile* is that election districts must be drawn to give proportional representation to minorities.

That is the Washington Post editorial page speaking.

The Assistant Attorney General of the United States for Civil Rights, William Bradford Reynolds, has testified:

> A very real prospect is that this amendment could well lead us to the use of quotas in the electoral process. We are deeply concerned that this language will be construed to require governmental units to present compelling justification for any system which does not lead to proportional representation.

The Reverend Jesse Jackson has stated the issue even more explicitly when he remarked in a Columbia, S.C. newspaper:

> Blacks comprise one-third of South Carolina's population, and they deserve one-third of its representation.

That is the issue in a nutshell.

The former Attorney General of the United States under a Democratic administration, Griffin Bell, sent a letter to this subcommittee reading:

> To overrule the *Mobile* decision by statute would be an extremely dangerous course of action under our form of government.

That is Jimmy Carter's Attorney General speaking.

Professor Joseph Bishop of the Yale Law School has testified:

> **It seems to me that the intent of the amendment is to ensure that blacks or members of other minorities are insured proportional representation. If, for example, blacks are 20 percent of a population of a State, Hispanics 15 percent, and Indians 2 percent, then at least 20 percent of the members of the legislature must be black, 15 percent Hispanic, and 2 percent Indian.**

That is Professor Joseph Bishop of the Yale Law School.

Dr. Walter Burns of the American Enterprise Institute and one of the Nation's leading constitutional scholars has testified:

> **The amendment is intended to reverse the Supreme Court's decision in *Mobile*. If adopted, this authorizes Federal courts to require States to change their laws to ensure that minorities will be elected in proportion to their numbers. Representative government does not imply proportional representation.**

The Wall Street Journal has written:

> **The results test would require dividing the community into the various races and ethnic groups the law happens to cover and trying to provide each with a representative.**

Prof. John Bunzel, senior fellow at the Hoover Research Institute at Stanford University says:

> **Equal access does not mean equal results. Under the amendment, proportional results would become the test of discrimination.**

Dr. William Gibson, president of the South Carolina NAACP, has stated frankly:

> **Unless we see a redistricting plan in South Carolina that has the possibility of blacks being elected in proportion to this population, we will push hard for a new plan.**

If that is not proportional representation by race, I do not know what is.

Similarly, Representative Garcia of New York noted during the House debate on the Voting Rights Act, and I quote him:

> **The proof of discrimination under the amended section two is the number of people who get elected.**

The Congressman is correct. That is precisely the proof of discrimination under the results test: the number of people who get elected.

Prof. Henry Abraham, the highly distinguished author of a number of important texts on constitutional law and government, the chairman of the department of government at the University of Virginia has testified:

> **Only those who live in a dream world can fail to perceive the basic thrust and inevitable result of the new section two. It is to establish a pattern of proportional representation now based upon race, perhaps at a large moment in time upon gender or religion or nationality.**

Prof. Donald Horowitz of the Duke University Law School, an author of a number of seminal books on the Supreme Court:

> **What the courts are going to have to do under the new test is to look at the proportion of minority voters in a given locality and look at the proportion of minority representatives. That is where they will begin their inquiry, and that is very likely where they will end their inquiry. We will have ethnic and racial proportionality.**

Prof. Edward Erler of the National Humanities Center testified:

> It would be difficult to imagine a political entity containing a significant minority population that was not represented proportionaly that would not be in violation of the new section.

I have belabored this point enough, but I would say to every individual in this room, in this Senate, and in this country that the results test is going to effect a transformation in civil rights policy in this country that few, if any, of us can predict if it is enacted. It will be a country in which considerations of race and ethnicity intrude into each and every public policy decision. Rather than continuing to move toward a constitutional colorblind society, we will be moving toward a totally color-conscious society. Rather than continuing to move in the direction of equality of access for all individuals without regard to race or color, we will move in the altogether different direction of equality of result with great regard to race or color.

The Supreme Court said in Mobile, and I will repeat it here:

> The results test would discard fixed principles of law in favor of judicial inventiveness that would go far toward making this court a superlegislature.

When this happens and when Cincinnati and Baltimore and Boston and Anchorage and Birmingham and Wilmington and Pittsburgh and Savannah and San Diego are forced to dismantle nondiscriminatory structures of local self-government, no one will be able to say that they did not expect this. There will be accountability, and I think there is more than an adequate record here to make that clear.

At this point I will recognize anybody else who has any statements to make. I would recommend that we proceed to the Mathias-Kennedy bill as the basic document for markup. If there is no objection, then that is the bill we use as the basic underlying document. Senator Thurmond?

The CHAIRMAN. That suits me if they wish to use the Mathias-Kennedy bill as the vehicle upon which we operate.

Senator HATCH. Maybe I should turn to our ranking minority member, Senator DeConcini, first.

Senator DECONCINI. I would be glad to yield to the Senator from South Carolina if he has any statement.

The CHAIRMAN. No, that is all I care to say.

Senator DECONCINI. I thank you, Senator Thurmond.

I would like to take this opportunity, Mr. Chairman, to once again thank you for the open and fair manner in which you conducted the hearings on the subject of the Voting Rights Act. Mr. Chairman, you have taken great pains to insure that every party involved, regardless of its viewpoints, has had a full and fair opportunity to express its point of view. When the Senate is to consider such an important bill as the Voting Rights Act Amendments of 1982, it is absolutely essential that each Senator have a full and complete record upon which to base his or her vote. You have insured that such a record is available. I congratulate you for that, Senator Hatch.

The subcommittee is about to act on the Voting Rights Act. As a result of my reading of the bill and my review of the subcommittee record, I am convinced that Senate bill S. 1992, now cosponsored by some 65 Members of the Senate including myself, is the best vehicle to strengthen the act and a national recommitment to the principles of equal voting rights for all citizens.

Many questions have been raised regarding the propriety of portions of this bill, especially section 2. Proponents of the bill, however, have answered each of these questions to my satisfaction. I am confident as I prepare to vote for S. 1992 that the results test embodied therein will not lead to a requirement of proportional representation by race in State and local governments nor to any of the other dire consequences suggested by the bill's opponents.

Perhaps the most important observation regarding these hearings and today's actions is the uniform expression of support by virtually every witness and by every Senator for the idea of equality in voting rights. As too many of us know too well, it was not always the case. While our individual interpretations and predictions vary, leading to vigorous support of one or another position, our goal is the same: equal participation for all in the American political process. Mr. Chairman, I have no objection to proceeding to this effort.

I would, Mr. Chairman, ask at this point that a statement made by the junior Senator from South Carolina, Senator Hollings, most recently on the floor of the Senate, which points out some very good arguments that I did not see expressed, at least by Senator Hollings, in the subcommittee record, I would ask unanimous consent that the reprint of his statement of March 23, 1982, in the Congressional Record be inserted at this point as part of my remarks.

Senator HATCH. Without objection, it is so ordered.

[Material referred to follows:]

[From the Congressional Record, p. S2622, Mar. 23, 1982]

EXTEND THE VOTING RIGHTS ACT

Mr. HOLLINGS. Mr. President, Henry Ward Beecher once wrote: "A man without a vote is a man without a hand." I tend to believe a man without a vote is a prisoner of those who seek to keep him disenfranchised. And that is why I am 100 percent behind the extension of the Voting Rights Act as put forward in S. 1992 without weakening amendments.

Seventeen years ago from three Sundays past, Dr. Martin Luther King, Jr., and thousands of voting rights demonstrators marched across Selma's Edmund Pettus Bridge to call attention to the fact that only 350 of Selma's 15,000 voting-age blacks were registered to vote. Though marching in a peaceful way, they were greeted on the other side of the bridge by a thunder of State troopers, sheriff's possemen, tear gas, clubbings and mass arrests. The confrontation of violence and nonviolence on that historic day not only called attention to a small Southern city. it induced a Nation to confront its conscience and protect the most fundamental right in a free society. the right to vote.

Since that time, a lot of things have changed; the violence has subsided, the tensions have eased, and men and women of different races and religions enjoy greater freedom and equality in the South and indeed throughout the country. Much of this gain in greater human understanding is due to the Voting Rights Act itself. For that reason, the Voting Rights Act of 1965 has been heralded as our Nation's most effective civil rights law. Called by Dr. King the "promissory note of the Constitution" and hailed by President Johnson as a "triumph for freedom as huge as any ever won on a battlefield," this act, as well as its 1970 and 1975 extensions, allows millions of Americans to register and to vote without fear or retribution or fear of ridicule.

Yes, we have come a long way from that Sunday in Selma and from the blatant inequities which, in many people's minds, were the trademarks of my part of the country. This is because the vote is a great equalizer. In my State of South Carolina, the numbers certainly tell a part of that story. In 1960, only 58,000 of black

South Carolinians were registered to vote; today over 319,000 are registered. That meant that, in 1960, only 15.6 percent of voting age black South Carolinians were able to go to the voting booth. Today, that number approaches 60 percent.

Indeed, the story is much the same in other places where the act has been applied, whether in the South or in northeastern cities, to protect black enfranchisement or in the West to protect the enfranchisement of a growing Hispanic population. It not only meant that minorities became a part of the process; they increasingly became part of the system. It is hard to imagine growth in the concerns of minority constituencies or growth in the number of minorities elected to public office or the greater understanding and respect for minority opinions without the protections offered by the Voting Rights Act. Whether one agrees or disagrees with specific concerns, with specific officials or with specific opinions, the fundamental is the same: A democracy which abridges participation is not merely a contradiction, it is wrong.

Sure, intellectual honesty tells us that technical improvements could be made, as we consider the extension of the Voting Rights Act. Unfortunately, the words "technical improvements" have become almost code words for dilution of the act. Some call for national application of the preclearance clause, and, on its face, it may seem equitable that all State election laws, not those simply of a few States and jurisdictions, should be cleared through the Justice Department. But, if preclearance were to be applied on a national basis without consideration of past discrimination, more resources and more man-hours would be required in order for the Justice Department to do its job effectively. If more resources were not provided, it is hard to imagine how the weakening of the act could be prevented.

The major debate which remains is whether intent or actual results should be the basis for claiming State election laws in violation of section 2 of the act. The Supreme Court decision in Mobile against Bolden cast a heavy cloud over a plaintiff s ability to prove discrimination under the act. As a lawyer, I know how difficult it is to prove intent or purpose. As a politician, I know that results speak louder than words of intent or purpose. Thus, a statutory amendment is needed to return the law to the original understanding of Congress; that the act reaches voting schemes that have discriminatory results, whether or not plaintiffs prove discriminatory intent.

Rules of evidence require tangible proof to prove intent. Those who discriminate do not commonly advertise their motives, particularly when there are laws on the books prohibiting such. Many discriminatory practices go back decades and records of their enactment are unavailable. In fact, despite the immortality of many voting schemes, often their authors are long since deceased. It is for these reasons that the House of Representatives wisely incorporated language in its extension of the Voting Rights Act which establishes results as the basis for findings, and that is why this Senator concurs with the House's wisdom in this matter.

Mr. President, with the gains we have made in our participatory government, it seems inappropriate and strange that we should even have to argue in this body the merits of extending this act. This act has not merely protected the enfranchisement of all of our citizens, it has opened the lines of communications for greater human understanding. Now is no time to turn back the clocks. Now is the time to reaffirm our belief that, in free society, the vote is not merely a privilege, it is a right. The vote is each person's special claim to life, liberty and pursuit of happiness. In a democratic republic like our own, we should do everything in our power to protect this most fundamental right. We can do that by extending a strong and fair extension of the Voting Rights Act.

Senator DeConcini. I thank the chairman.

Senator Hatch. Are there any amendments?

Senator Grassley. I have a statement and also an amendment.

Senator Hatch. Senator Grassley?

Senator Grassley. As a member of this subcommittee, I have had an opportunity to actively participate in the hearings on the proposed extension of the Voting Rights Act of 1965. Today I will cast the most important civil rights vote of my career. Before I cast my vote, I would like to make a few statements regarding this vital issue.

First of all, I would like to commend the chairman, Senator Hatch, for conducting these hearings in a most respectable and fair manner. I realize that presiding over these hearings on this emotional issue presented him a rather formidable task. In the years that I have represented the people of Iowa as a Representative and now as a Senator, I have never witnessed such an equitable, thorough, and indepth investigation of an issue which is as complex and emotional as this issue is. I only hope that those who have observed these proceedings would portray them accurately. Unfortunately, the emotional character of this issue may have led some observers to misinterpret the real issues involved.

The question is not whether or not there will be a Voting Rights Act. While certain time periods in the act are about to run, the Voting Rights Act of 1965 itself is permanent statutory law; it will never expire. The question that this subcommittee has investigated is twofold. First, we must decide whether the new section 5 bailout criteria, as proposed by the House version is desirable. Should the Congress take action to prevent certain jurisdictions which have been covered for 17 years from bringing bailout suits in August?

Second, we must determine whether the proposed change in the existing language of section 2 of the act is indeed desirable. In other words, should the Congress overturn the Supreme Court decision in *Mobile* versus *Bolden* and declare that an establishment of a section 2 violation requires showing only of a discriminatory result rather than a discriminatory intent?

Our distinguished colleagues in the House focused their hearings on the section 5 issue. We in the Senate have investigated the section 2 issue more thoroughly. We have heard the testimony of many legal experts who are in disagreement on the merits of amending this act. As I stated, much of the debate in the Senate hearings has been on the meaning of the changes in section 2.

We have heard from countless witnesses whose good-faith testimony has been evenly divided on the desirability of amending section 2. While I have heard many convincing arguments both pro and con, I submit that there remains much confusion as to the probable impact of any change in section 2.

Having considered the hearing records from both bodies, I must confess that I am disappointed that there has been no meeting of the minds. Throughout the debate, I have continuously asked this question: Is there some middle ground? I have sought the counsel of various members of the Judiciary Committee on both sides of the aisle in an attempt to find some point of reconciliation of these views. Unfortunately, at this time I have not found that point of reconciliation, but I do believe that compromise is attainable.

Frankly, as the chairman knows from our private discussions with him, I wish that this markup could have been delayed. I even expressed my feelings that it should not have taken place today, but I know that the chairman has made a commitment to do that; and so we are moving forward with the markup.

I understand, however, that, since that was not possible, that I looked for other things that could be done. Therefore, I believe that the best course of action for me today is to vote for a simple 10-year extension of the existing law, with the understanding that I will continue to seek the reconciliation which I have mentioned and reserving the right to modify my vote in the future.

Therefore, Mr. Chairman, at the appropriate time—and if that time is now I will do it—I will move to report S. 1992 but amend it to reflect a simple 10-year extension of the act.

Senator **HATCH**. We are open to amendment.

Senator **GRASSLEY**. Then I so move.

Senator **HATCH**. Let me clarify what you are moving. As I understand it, you are moving to substitute the present act, the existing law for S. 1992 and extend it for 10 years?

Senator **GRASSLEY**. Yes.

Senator **HATCH**. Are there any other changes?

Senator **GRASSLEY**. Yes, and also to extend for the same length of time the bilingual provision.

Senator **HATCH**. You would include that?

Senator **GRASSLEY**. Yes, I would.

Senator **DECONCINI**. Mr. Chairman, is that then in the nature of a substitute for the S. 1992 that is before us?

Senator **GRASSLEY**. A series of amendments that we are moving en bloc.

Senator **HATCH**. OK.

Senator **GRASSLEY**. I have copies of the amendment right here.

Senator **HATCH**. Without objection, the proposed amendments will be inserted.

[Material referred to follows:]

AMENDMENTS TO S. 1992 OFFERED BY MR. GRASSLEY

Amendment No. 1: Strike everything in Section 1 from page 1, line 3 through page 8, line 14 and insert in lieu thereof, "That this Act may be cited as the Voting Rights Act Amendments of 1982."

Amendment No. 2: Strike everything in Section 2 from page 8, line 15 through page 8, line 22 and insert in lieu thereof—

"SEC. 2. Section 4(a) of the Voting Rights Act of 1965 is amended by—

(1) striking out 'seventeen' each time that it appears and inserting in lieu thereof 'twenty-seven'; and

(2) striking out 'ten' each time that it appears and inserting in lieu thereof 'seventeen'."

Amendment No. 3: Strike everything in Section 4 from page 9, line 1 through page 9, line 7.

Amendment No. 4: Strike everything in Section 5 from page 9, line 8 through page 9, line 10.

Amendment No. 5: Strike the description of the bill preceding the enactment clause and substitute in lieu thereof: "To amend the Voting Rights Act of 1965 to extend certain provisions for ten years".

Senator **HATCH**. What you are saying is, when you proceed with your series of amendments—and you are moving them en bloc—we will have the existing law with a 10-year extension——

Senator **GRASSLEY**. For section 5.

Senator **HATCH**. Including the bilingual provisions.

Senator **GRASSLEY**. Yes, until 1992.

Senator **HATCH**. The Senator from Arizona?

Senator **DECONCINI**. I am prepared to vote.

Senator **HATCH**. Does anybody else have any amendments or any comments about the amendments of the Senator from Iowa? The Senator from South Carolina, our chairman.

The CHAIRMAN. Mr. Chairman, first, I want to thank you for the fine series of hearings that you have conducted on this important legislation over the past 2 months. The record which has been established by this subcommittee has been balanced and fair, and the proponents of each issue have had ample opportunity to present their views.

Also, I want to commend Senator Grassley for his concern and the obvious thought that he has put into his proposal, which he has just offered. While I respect his position on this matter, I have concerns about his proposal. His approach must be considered in light of other proposals before the subcommittee, however.

The record of the hearings on voting rights has revealed that this is not a simple matter. The House-passed version of the bill would drastically change the law relative to section 2 actions, and the testimony on this amendment alone has revealed, even among its supporters, that there is no consensus as to its meaning. To this very minute, no one really knows the meaning of "results" as it is used in section 2 or how it would affect litigation. Moreover, the so-called disclaimer language, rather than clarifying the proposed change, has only served to cloud the issue.

In addition, the House-proposed bailout, instead of providing incentive to covered jurisdictions, has done nothing but raise more questions. Not a single witness was able to articulate the meanings of such terms as election methods "which inhibit or dilute equal access" or "constructive efforts" for expanded electoral opportunities.

Despite a facade of fairness, the House bill would create gross injustice. The provision that would bar bailout because a jurisdiction has entered into a consent decree flies in the face of well-established legal principles encouraging settlement of cases. Additionally, the House provision that blocks bailout through the appointment of examiners by the unreviewable action of the Attorney General is not fair or reasonable, no matter how many people claim it is. The net result of the House bill would be that preclearance would be extended forever, and that is clearly unconstitutional and totally unacceptable.

In discussions on this issue, many people have been guilty of oversimplification and plain misinformation. Factual debate has been ignored in favor of name-calling and exaggeration. Too often, there has been editorializing rather than reporting the real issues involved. It would have been easy for this subcommittee to ignore the critical issues in this legislation and to acquiesce and act without proper hearings.

Senator Hatch is to be commended for taking the tougher, more responsible course. The press does a disservice to the people if it takes the easy path and fails to carefully examine and report the full range of important issues that have been presented before this subcommittee. Senator Grassley proposes to extend the 1965 Voting Rights Act for 10 years, the longest extension ever of this legislation. For anyone to claim that this Grassley proposal in any way weakens or undercuts the current law is a complete misstatement and borders on a reckless disregard of the truth.

The Grassley extension is a tough proposal, and I have indicated other approaches which I felt were reasonable alternatives to straight extension. However, I believe that Senator Grassley's proposal will clearly underscore again our commitment to the right to vote and will allow us to turn our full attention to other issues also critical to all Americans: A healthy economy and strong national defense. As we address these two issues, there is no room for unnecessary divisiveness in this country; and, therefore, I will support a full extension of the Voting Rights Act in its present form.

Senator Hatch. Thank you, Senator.

Are we prepared to vote?

Senator DeConcini. Mr. Chairman, just a question: We are voting not to report the bill, but on the amendments offered by the Senator from Iowa?

Senator Hatch. Right, and I presume that, if the amendments pass, then we would vote on final passage.

Senator DeConcini. That is fine, Mr. Chairman.

Senator Hatch. So, the vote will be whether the amendments of the Senator from Iowa, offered en bloc, will be accepted. The clerk will call the roll.

Are you asking for them en bloc?

Senator Grassley. Yes.

Senator Hatch. The clerk will call the roll.

The Clerk. Senator Thurmond?

The Chairman. Aye.

The Clerk. Senator Grassley?

Senator Grassley. Aye.

The Clerk. Senator DeConcini?

Senator DeConcini. No.

The Clerk. Senator Leahy?

Senator DeConcini. No by proxy.

The Clerk. Senator Hatch?

Senator Hatch. Aye.

The amendments en bloc carry three to two.

Senator Grassley. I move that the bill be reported.

Senator Hatch. The motion to report the bill out of the subcommittee as amended by the Senator from Iowa is next. The clerk will call the roll.

The Clerk. Senator Thurmond?

The Chairman. Aye.

The Clerk. Senator Grassley?

Senator Grassley. Aye.

The Clerk. Senator DeConcini?

Senator DeConcini. Aye.

The Clerk. Senator Leahy?

Senator DeConcini. Aye by proxy.

The Clerk. Senator Hatch?

Senator Hatch. Aye.

The bill will be reported to the full committee.

Because of the unusual circumstances of the legislative debate over this measure, the House version of the Voting Rights Act extension remains on the calendar of the full Senate. Therefore, I have asked the subcommittee staff to prepare a subcommittee report to the full Judiciary Committee on this matter. I am extremely concerned that, if the matter is brought down from the calendar, as I keep hearing from some of the proponents of this bill, that there be some official report on this extremely important matter. We have held thorough and balanced hearings. I do want to insure that the substance of these hearings is communicated in the form of a congressional document. I would therefore request that any additional supplemental or minority views to the proposed report, which is contained in all of our folders here, be submitted no later than 5 days following this markup. We will extend the normal 3-day period to allow greater time for any Senators who may wish to submit such views. I wish that even more time could be provided, but I think we have all been through this. I think we all have worked very hard on it. I want to move it through as expeditiously as we can to the full committee and, of course, work on it at the full committee at that time and allow the full committee to work its will.

Is there any objection to this?

Senator DeConcini. Mr. Chairman, if I could just ask a question. You are suggesting that it be held at the full committee until the report is finished?

Senator Hatch. Yes. It goes to the full committee. I am suggesting we get 5 days to prepare any additional views, supplemental views, or minority views. This will be a subcommittee report.

Senator Grassley. Do you want more time?

Senator DeConcini. My interest, Mr. Chairman, is to get it on the agenda of the full committee as soon as we can and, as you said, let the committee work its will. I think it is important that we move on this and, if possible, before we get bogged down with debt ceiling limitation and budget acts and what have you. If the chairman of the full committee, who is here today also, agrees with that, I would just like to do whatever we can to expedite that without rushing anybody on the full committee. But the sooner we can get it on there and get it reported out of the full committee, I think the better it is for this whole country.

Senator Hatch. If we can live up to this 5-day deadline here, we will have acted very expeditiously because this is a complex matter.

Senator DeConcini. How long would it take to have the subcomittee report?

Senator Hatch. The report is done. All we have to do is have any supplemental or any other report, including any minority report, prepared within 5 days.

Senator DeConcini. This would be reported then to the full committee at the end of 5 days.

Senator Hatch. That is right.

Senator DeConcini. So then we could have it up on the agenda sometime in the next couple of weeks, at least for the first round?

Senator Hatch. You could have it up at any time the full committee wants to bring it up. But I am encouraging the full committee to bring it up at its earliest convenience. I would hope that would be within a reasonable period of time.

The Chairman. As Chairman of the full committee, I want to say there will be no delay. However, we do have a gun control by Senator McClure that is on there now to be acted upon. We have an antitrust bill that is to be acted upon. We have several other pieces of legislation. But it will be put on the agenda as soon as it can be.

As you know, of course, we have about a 10-day recess here, too. I would hope that we can get these other matters and this bill, too, all acted on within 30 days' time. I will cooperate.

Senator **DeConcini**. Mr. Chairman, one of the most important bills, I think, that is there is one sponsored by Senator Dole, S. 2000, regarding bankruptcy. That is on our agenda.

The **Chairman**. That is on the agenda, too, and should be acted upon.

I do not think there will be any delay on any of them if we get cooperation from the members of the committee.

Senator **DeConcini**. You always get cooperation from the minority, Mr. Chairman. You know that, and we will be right there helping.

The **Chairman**. We have not had quite the cooperation from the minority on the gun control bill and the antitrust bill, as you know.

Senator **Hatch**. We have always had good cooperation from the Senator.

The **Chairman**. So far as the Senator from Arizona is concerned, he has cooperated on those. I want to congratulate you.

Senator **Grassley**. I would like to ask the Senator from Arizona, if I come up with some language on section 2, if he would take a look at it and give it some consideration?

Senator **DeConcini**. Absolutely.

Senator **Hatch**. If that is acceptable, then we will wait for 5 days before we print the report of the subcommittee in deference to those who would like to file additional, supplemental, or minority views. Then we will bring this up in the full committee, I presume, within the next month.

The **Chairman**. I would hope that it can get up within the next month. As I said, there are some other bills ahead of it. But I assure you there will be no delay on the part of the chairman on any of this legislation.

Senator **Hatch**. With that, we will adjourn the subcommittee, having approved the longest extension of the Voting Rights Act in its history.

[Whereupon, at 4:21 p.m., the subcommittee was adjourned.]

EXECUTIVE SESSION CONSIDERING VOTING RIGHTS ACT

TUESDAY, APRIL 27, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The CHAIRMAN. The committee will come to order.

We were scheduled to meet at 11 a.m. today, as you know, to act on this bill. There was objection filed to meeting while the Senate is in session. Some Senator objected. That would have put it off from 9:45 until 11:45. The Senate has been tied up with the cloture vote and motions and so forth until now. The time has now expired where we cannot meet.

Tomorrow I am going to call a meeting an hour sooner. We meet at 10 o'clock tomorrow.

Senator HATCH. Mr. Chairman, what time does the Senate come in tomorrow?

The CHAIRMAN. I do not know. That has not been fixed.

Senator HATCH. I wonder if we can meet a little earlier so that we can dispose of this matter tomorrow. This is an important matter.

I have differences with a number of people on this committee on this issue. The subcommittee has documented those differences in an extensive report which we think justifies the position that we have taken against the so-called results test under section 2. I think it is the single most important constitutional issue confronting the Congress at this time. I think it has been given short shrift in the House of Representatives and by almost everybody commenting on the Voting Right Act amendments.

I personally believe that everybody concerned deserves to have this matter acted upon no later than tomorrow. If it would please the Senator, if we can get unanimous consent to meet, then I would hope that we could complete consideration by that time. But, if we cannot, maybe we should meet a little earlier so we can get the statements out of the way before any votes come.

I understand that by 10 o'clock every Senator can probably be here.

The CHAIRMAN. We will start an hour sooner.

Senator HATCH. I think we should because there will be a number of statements on this matter.

The CHAIRMAN. I understand that Senator East has therapy every morning and cannot get here until 10.

Senator HATCH. I see.

The CHAIRMAN. I am setting it as early as I could. I am going to see that this bill is pushed. We have an obligation to do it. It may turn out that we may have to meet here earlier or later, maybe stay at night and meet.

Senator HATCH. I would be willing to do that.

The CHAIRMAN. I think tomorrow we will meet at 10. We will try that.

Senator HATCH. That will be fine, Mr. Chairman.

The CHAIRMAN. I started to say it should not take too much time, but it may; it may take considerable time.

Senator HATCH. I think we can dispose of it, if we can have possibly 2 hours.

The CHAIRMAN. The Senate does not meet tomorrow until 12 o'clock. We can meet 2 hours after the Senate meets. If we meet at 10, that would carry us over until then. I think we will make headway. We are going to stay on it until we get action. We are obligated to do it.

Is there any other suggestion from anybody else? Senator Heflin, do you have any?

Senator HEFLIN. I would suggest that effort be made to get permission on the floor to meet even during the time that the Senate is debating some other matter. One of the Senators must have filed an objection today, but again he may not file it tomorrow. I think it would be helpful in order to dispose of it.

The CHAIRMAN. We will try to get permission to meet while the Senate is in session.

Senator HATCH. I am willing to support the chairman in obtaining that permission. I would be happy to go to the floor and ask for it personally.

The CHAIRMAN. The Senate is in recess now until 2 o'clock. At 2 o'clock I will get the majority leader to propound that request, or I will do it myself.

Senator HATCH. That will be fine.

The CHAIRMAN. We will meet tomorrow at 10 o'clock. The meeting stands in recess.

[Whereupon, at 12:14 p.m., the committee stood in recess, to reconvene at 10 a.m. the following day.]

EXECUTIVE SESSION CONSIDERING VOTING RIGHTS ACT

WEDNESDAY, APRIL 28, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

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The CHAIRMAN. The next item on the agenda is S. 1992, to amend the Voting Rights Act of 1965 to extend the effect of certain provisions, and for other purposes. Senator Hatch is chairman of the Constitution Subcommittee, which considered these matters. Senator Hatch, are you ready to make a report?

Senator HATCH. I am prepared, Mr. Chairman.

The CHAIRMAN. I will acknowledge you at this time then.

Senator HATCH. I will be happy to yield to Senator Dole for a question.

Senator DOLE. Mr. Chairman, it is important that Senator Laxalt and I attend another meeting at 11:15. I do not know how long Senator Hatch may want to discuss this very important matter. There are amendments that some of us have to offer. I wonder if we might be protected at least in that timeframe from 11:15 maybe to 11:30 or longer. Can we have some assurance?

The CHAIRMAN. I think so. We are not going to have a delay on this bill. I had a very prominent civil rights leader call me this morning. He is anxious for some agreement to be reached on something. He suggested that we not vote today, give him time to work a little. So, I think we can get the statements from everybody today and hear from everyone. We might delay any voting until tomorrow. It will not take long once we start voting, I do not think, on the amendments that will be coming up.

Senator HATCH. Mr. Chairman, I might add that I am as interested in resolving this matter satisfactorily as anybody. So, I think the request of Senator Dole is certainly in order. We will certainly work with anybody to try and resolve this problem.

The CHAIRMAN. If there is no objection, we will not have any votes today. That will give you an opportunity to meet with the President on his budget. We will have statements today and discussion and get ready then possibly by tomorrow to go into the voting.

Senator DOLE. That would be very helpful. I have been discussing certain provisions with Senator Heflin and others on the committee. There may be some agreement among some of the Senators on the committee. So, we just want to be there when we get to that point.

The CHAIRMAN. All right. Senator Hatch, you have the floor.

Senator **Hatch**. Thank you, Mr. Chairman. I apologize to my colleagues on the committee because I do have a rather lengthy statement. But I think this is a very important issue. I think that the statement needs to be made. With those apologies, let me make it.

The **Chairman**. I wanted to make an opening statement first. If anybody else has an opening statement, we can give him a chance to do it.

Senator **Hatch**. I would rather go ahead with this statement first, and then I will have it over.

The **Chairman**. I have acknowledged you.

Senator **Kennedy**. Mr. Chairman, as a point of inquiry on the point that Senator Dole raised, does this suggest that the Senator was going to be recognized first afterward for the first amendment? Are you making that request?

Senator **Dole**. I did not make that request. I just wanted to be certain that there would not be votes taken while we were necessarily absent because I will have an amendment to offer.

The **Chairman**. This is a very important matter. We do not want any delay; yet, we do not want to unduly rush it. There is a lot of interest in this matter on both sides.

Today the committee will begin consideration of the Voting Rights Extension bill of 1982, S. 1992. As we all know, the issues that we are about to discuss involve one of the most fundamental rights possessed by a citizen of this Nation, the right to vote. There is complete agreement, I am sure, that this right is the very wellspring of our democratic process.

I want to thank Senator Hatch for conducting the fine series of hearings that his subcommittee held on this matter during the latter part of January and throughout the month of February. I believe that the record that was established is balanced and fair, and the advocates of each position had ample opportunity to present their views. Through his exemplary chairmanship, Senator Hatch insured that each important point was adequately aired, and I think the members of the committee owe the Senator from Utah a debt of thanks for the manner in which he directed the inquiry of the subcommittee.

Now is the time for the full committee to examine the issue. I am certain that there are strong convictions held by every member with regard to one question or another. It is my intention that every Senator who wishes should have a sufficient opportunity to state his position and that there should be a complete discussion. I am certain that each member of this committee will respect this approach and that our debate will proceed in an orderly fashion.

I now acknowledge the chairman of the subcommittee that handled this bill, Senator Hatch.

Senator **Hatch**. Thank you, Mr. Chairman. Once in a great while this body considers legislation that must be looked upon as a watershed with respect to the direction in which this Nation is going to go. One of these occurred in 1965 in which this Nation committed itself to the goal of insuring that no citizen, whatever his or her race or color, would be denied the opportunity to participate in the electoral process. As there are to all great objectives, there was a cost involved, a cost relating to the transformation of traditional values of federalism itself. Under the 1965 act, sovereign States would be required to secure the approval of the Federal Government prior to enacting changes in their voting laws and procedures, an obligation that many at the time viewed as inconsistent with the respective roles of the State and National Governments.

Despite these costs, the Voting Rights Act of 1965 was necessary and is necessary legislation. It was necessary in order to overcome a clear and indisputable history of discrimination in various parts of the country that had worked to deny individuals their constitutional rights not to be denied suffrage on the basis of race or color. It was an extraordinary piece of legislation, but it was necessary to secure the most basic, fundamental right of all rights in a free and democratic society, the right to vote for the candidate of one's choice.

Mr. Chairman, today the Judiciary Committee again considers legislation that, in my view, is a watershed and is likely to define in an important manner what this Nation is all about. Again, the legislation to be considered is described as voting rights legislation. This time, however, the objectives are different, vastly different. Instead of leading ultimately to the nonconsideration of race in the electoral process as was the objective of the original Voting Rights Act, the present legislation would make the consideration of race the overriding consideration in decisions in this area. Instead of directing its protections toward the individual as did the original act, and as does the Constitution, the present legislation would make racial groups the focus of protection. Instead of reinforcing in the law the great constitutional principle of equal protection, the present legislation would substitute a totally alien principle of equal results and equal outcome.

Mr. Chairman, in short, the debate on the new version of the Voting Rights Act will focus upon one of the most important public policy issues ever to be considered by this body. I do not believe that my colleague in the House from Illinois, Mr. Hyde, is far from the mark when he describes this as a measure with "consequences as potentially far-reaching as any legislation ever enacted." This is legislation with both profound constitutional implications and profound practical consequences. In summary, the issue is how this Nation is going to define "civil rights" and "discrimination."

Both in popular parlance and within judicial forums, the concept of racial discrimination has always implied the maltreatment or disparate treatment of individuals because of race or skin color. As the 15th amendment to the Constitution states:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

In other words, discrimination has been viewed as a process by which wrongful decisions were made, decisions reached at least in part because of the race or skin color of an individual.

This conception of discrimination has always been reflected in the constitutional decisions of the judicial branch of our Nation. In interpreting the equal protection clause of the 14th amendment, for example, the Supreme Court has observed:

> A law neutral on its face and serving ends otherwise within the power of government to pursue is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.

In other words, as the court subsequently observed:

> Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Official action will not be held unconstitutional solely because it results in racially disproportionate impact.

No decision of the Supreme Court has ever interpreted the 13th, 14th, or 15th amendments to the Constitution, the Reconstruction Amendments, to require anything other than proof of intentional or purposeful discrimination in order to establish a violation.

Proof of discriminatory intent or purpose is the essence of any civil rights violation for the simple reason that there has never been an obligation upon either public or private entities to conduct their affairs in a manner designed to insure racial balance or proportional representation by minorities in employment, housing, education, voting, and the like. Rather, the traditional and entirely proper obligation under civil rights law has been to conduct such affairs in a manner that does not involve disparate treatment of individuals because of race or skin color. And the important words are because of and race or skin color.

What is being proposed in the present Voting Rights Act or the House Voting Rights Act debate is that Congress amend the Voting Rights Act and alter this traditional intent standard. In its place would be substituted a new results standard. Rather than focusing upon the process of discrimination, the new standard would focus upon electoral results or outcome. With all due respect to my friend and distinguished colleague from Kansas, Senator Dole, this would be the case whether or not this committee adopted the unamended House results test or the one version I have seen that he had put forth. In many respects I fear that the so-called Dole compromise would establish an even more rapid and all-encompassing results test than the House bill. But I understand that that is in a state of flux now. I hope that the final compromise may be one that I can support. Either of the proposed amendments to the present act would effect a landmark transformation in the principal goals and objectives of the Voting Rights Act.

It should be understood at the outset that proponents of the results test are no longer even talking about discrimination; they are simply talking about disparate impact. These concepts have little to do with one another. Rather than simply focusing upon those public actions that obstructed or interfered with the access of minorities to the registration and voting processes, the proposed results test would focus upon whether or not minorities were successful in being elected to office. As Representative Garcia, a proponent, observed during the House debate, "The proof of discrimination under the amended section 2 is the number of people who get elected."

Discrimination would be identified on the basis of whether minorities were proportionately represented, to their population, on elected legislative bodies rather than upon the traditional question of whether minorities had been denied access to registration and the ballot because of race or skin color.

Despite objections to the description of the results test as one focused upon proportional representation for minorities, there is no other logical means to the test. To speak of "discriminatory results" is to speak purely and simply of racial balance and racial quotas. The premises of the results test is that any disparity between minority population and minority representation evidences discrimination. As the Supreme Court observed in the 1980 decision of *City of Mobile* v. *Bolden*:

> The theory of the dissenting opinion—proposing a results test—appears to be that every political group or at least every such group that is in the minority has a Federal constitutional right to elect candidates in proportion to its numbers. The Equal Protection Clause does not require proportional representation as an imperative of political organization.

In *Mobile*, the court summarily rejected the notion that the results test was not directed toward proportional representation. The court observed:

> The dissenting opinion seeks to disclaim the proportional representation description of its theory by suggesting that a claim of vote dilution may require, in addition to proof of electoral defeat, some evidence of historical and social factors indicating that the group in question is without political influence. Putting to the side the evident fact that these gauzy sociological considerations have no constitutional basis, it remains far from certain that they could, in any principled manner, exclude the claims of any political group that happens for whatever reason to elect fewer of its candidates than arithmetic indicates it might. The limits are bound to prove illusory.

It is not simply the Supreme Court that has affixed the label of proportional representation to the proposed results test. Consider a few other observations. The House report itself on this measure states:

> The fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population would be highly relevant under the proposed amendment.

The Attorney General of the United States has testified:

> Under the new test, any voting law or procedure in the country which produces election results that fail to mirror the population's make-up in a particular community would be vulnerable to legal challenge. If carried to its logical conclusion, proportional representation or quotas would be the end result.

The former Attorney General of the United States, Griffin Bell, has written:

> To overrule the *Mobile* decision by statute would be an extremely dangerous course of action under our form of government.

The Assistant Attorney General for Civil Rights has testified:

> A very real prospect is that this amendment could well lead us to the use of quotas in the electoral process. We are deeply concerned that this language will be construed to require government units to present compelling justification for any voting system which does not lead to proportional representation.

The distinguished constitutional law professor, William Van Alstyne, has written:

> The proposed amendment must invariably operate to create racially defined wards throughout much of the nation and to compel the worst tendencies toward race-based allegiances and divisions.

Joseph Bishop of the Yale Law School has written:

> It seems to me that the intent of the amendment is to ensure that blacks or members of other minority groups are ensured proportional representation. If, for example, blacks are 20 percent of a State, Hispanics 15 percent, and Indians 2 percent, then at least 20 percent of the members of the legislature must be black, 15 percent Hispanic, and 2 percent Indian.

Henry Abraham, chairman of the Department of Government at the University of Virginia, recently testified:

> Only those who live in a dream world can fail to perceive the basic thrust and purpose and inevitable result of the new section 2; it is to establish a pattern of proportional representation, now based upon race, perhaps at a later time upon gender or religion or nationality.

John Bunzel of the Hoover Institution, former president in the University of California system, has testified:

> Equal access does not mean equal results. Under the amendment, proportional results have become the test of discrimination.

Mr. Chairman, I can go on and on with constitutional scholars, political scientists, litigators, and the media who have quickly and correctly identified the proposed results test for what it is: an entirely and genuinely radical effort to substitute for the notion of equal opportunity in the electoral process the notion of equal outcome. I use the entirely overworked term radical as precisely as I can in this respect. Even the Washington Post, which has carried on a ceaseless campaign for the House bill in both its editorial and news pages, remarked after the Supreme Court's decision in *Mobile*:

> The logical terminal point of those challenges to *Mobile* is that election districts must be drawn to give proportional representation to minorities.

Apart from the fact that the results test imports into the Voting Rights Act a theory of discrimination that is inconsistent with the traditional understanding of discrimination, the public policy impact of the new test would be far reaching, perhaps as far reaching as any legislation ever passed by this body. Under the results test—and I emphasize again that this would be true under either the House version or the marginally altered Dole version which I have seen—Federal courts would be obliged to dismantle countless systems of State and local government that are not designed to achieve proportional representation. This is precisely what the plaintiffs attempted to secure in the *Mobile* case and, in fact, were successful in achieving in the lower Federal courts. Despite the fact that there was no proof of discriminatory purpose in the establishment of the at-large electoral system in *Mobile* and despite the fact that there were clear and legitimate nondiscriminatory purposes to such a system, the lower court in *Mobile* ordered a total revampment of the city's municipal system because it had not achieved proportional representation.

Let there be no mistake about it in this room. The at-large system of government is the principal immediate target of proponents of the results test. Despite repeated challenges to the propriety of at-large systems, the Supreme Court has consistently rejected the notion that the at-large system is inherently discriminatory toward minorities. The court in *Mobile* further observed that literally thousands of municipalities throughout the Nation, approximately two-thirds of the 18,000 in the country, have adopted an at-large system.

To establish a results test in section 2 would be to place at-large systems in constitutional jeopardy throughout the Nation, particularly if jurisdictions with such electoral systems contained significant numbers of minorities and lacked proportional representation on their elected representative councils or commissions. As observed in the subcommittee report and by the Assistant Attorney General for Civil Rights in his testimony, a few of the most vulnerable cities under the results test which would be affected if the House bill is enacted would include Anchorage, Alaska; Baltimore, Md.; Birmingham, Ala.; Boston, Mass.; Cincinnati, Ohio; Dover, Del.; Fort Lauderdale, Fla.; New York City, N.Y.; Norfolk, Va.; Kansas City, Kans.; Pittsburgh, Pa.; San Diego, Calif.; Savannah, Ga.; and Wilmington, Del. These are only a few of the most obvious examples of vulnerable communities; they represent only the tip of the iceberg.

Under the results test, each of the systems of self-government adopted by these and other communities would be subject to judicial scrutiny by the Federal courts. To the extent that electoral results become the focus on discrimination analysis, and indeed define the existence or nonexistence of discrimination, it is difficult to conceive how proportional representation by race can avoid being established in the law as the standard for identifying discrimination and, equally important, as the standard for ascertaining the effectiveness of judicial civil rights remedies.

Nor is it only the at-large electoral system which is the object of the results test. In addition, the change in section 2 will preclude any meaningful annexation by municipalities—for whatever reason, certainly valid reasons included—Government consolidations, county consolidations, or other similar reorganizations in areas having minority populations.

Second, it will place in doubt State laws governing qualifications and educational requirements for public office. Third, it will dramatically affect State laws establishing congressional districts. State legislative districts, and local governing body apportionment or redistricting schemes. Fourth, it will place in serious doubt countless provisions in election codes throughout the Nation. Such common and well-established practices as anti-single-shot voting requirements, majority vote requirements, cancellation of registration for failure to vote, residency requirements, special requirements for independent or third-party candidacies, numbered electoral posts, and staggered electoral terms are also explicit targets of the results test.

Quite apart from the notion of proportional representation, the more I think about it the more convinced I become that the most fundamental distinction between the intent standard and the results standard involves an even greater issue. The real issue is whether or not we are going to define civil rights in this country by a clear, determinable standard, through the rule of law, as it were, or by a standard that literally no one can articulate. In describing discrimination under the results test, Benjamin Hooks, for example, president of the NAACP, testified:

> Like the Supreme Court Justice said about pornography, I may not be able to define it but I know it when I see it.

In the final analysis, that is precisely what discrimination boils down to under the results test because there is no ultimate standard for identifying discrimination, short of proportional representation.

Under the intent test, judges or juries evaluate the totality of circumstances on the basis of whether or not such circumstances raise an inference of intent to discriminate. In other words, once they have before them the entire array of relevant evidence relating to an alleged discriminatory action, the ultimate or threshold question is, "Does this evidence add up to an inference of intent to discriminate?"

Under the results test, however, there is no comparable question. Once the evidence is before the court, whether it be the totality of circumstances or any other defined class of evidence, there is no logical threshold question by which the court can assess and evaluate the evidence short of proportional representation. As Professor Blumstein of the Vanderbilt Law School has testified:

> The thing you must do under the intent standard is to draw a bottom line. Basically, is the rationale ultimately a sham or a pretext or is it a legitimate neutral rationale. That is under the intent standard and that is a fact-finding decision in the judge or the jury. Under the results standard it seems to me that you do not have to draw the bottom line. You just have to aggregate out a series of factors and the problem is, once you have aggregated out those factors, what do you have? You know it is the old thing we do in law school: you balance and you balance but ultimately how do you balance? What is the core value?

There is no core value under the results test except for the value of equal electoral results for defined minority groups or proportional representation.

The implications of this are not merely academic. In the absence of such standards, the results test affords virtually no guidance whatsoever to communities in evaluating the legality and constitutionality of their government arrangements; that is, if they lack proportional representation. And it affords no guidance to courts in deciding section 2 suits if there is a lack of proportional representation. By undermining a fixed rule of law and substituting a new rule of "you know discrimination when you see it," the results test would, in the words of the Supreme Court in Mobile: "Discard these fixed principles in favor of a judicial inventiveness that would go far toward making this court a superlegislature."

In addition to pointing out what I believe are the shortcomings of the results test, I would like to defend the continued use of the intent standard as the means for identifying discrimination. Controversy concerning the standard and the *Mobile* case stems from three basic contentions. First, it is argued that the *Mobile* decision is contrary to the original intent of Congress. Second, it is argued that the decision was contrary to prior law. Third, it is argued that it poses a test for identifying discrimination which is impossible to satisfy. Let me respond to these in turn.

First, as to the matter of original congressional intent, proponents of the results test argue that a results or effects standard was the original object of Congress in section 2 and that this object was misinterpreted by the court in *Mobile*. To this I would simply respond that Congress chose explicitly to use the effects test in sections 4 and 5 of the act in highly unusual and limited circumstances. The fact that such language was omitted from section 2 is conspicuous and telling. If Congress had intended to use a results or effects test in section 2, they had already demonstrated that they were quite capable of drafting such a provision. Congress chose pointedly not to do this. Proponents of the results test have also frequently taken out of context a single, ambiguous remark by former Attorney General Katzenbach on the subject, the only source that is even ambiguous on this matter in several thousand pages of testimony on the Voting Rights Act in 1965.

Second, results proponents argue that *Mobile* effected a major shift in the law and that all that they wish to do is restore the pre-1980 law in this area. With all due respect, this is utter and, I might say, arrant nonsense. Section 2, as well as the 14th and 15th amendments, have never required anything less than intentional or purposeful discrimination, either before, during, or after *Mobile*. There is no Supreme Court case that anyone can point to to justify this argument. As the court again observed in *Mobile*:

> None of the court's Fifteenth Amendment decisions has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation.

It is interesting that proponents of the results test place such great reliance upon a single Supreme Court decision, *White* v. *Regester*, to argue for the proposition that the pre-*Mobile* standard was something other than intent. Apart from the fact that *White* was neither a section 2 case nor a 15th amendment case, there can be little doubt that it, too, required proof of discriminatory purpose. This was not only the judgment of the Supreme Court in *Mobile*, but it was also the judgment of several of the dissenters in *Mobile*. Included among these was Justice White, who wrote the *White* v. *Regester* decision. While he disagreed with the court as to whether or not a discriminatory purpose had been evidenced in the city of Mobile, he did not disagree that discriminatory purpose was the correct standard.

The only reason that the court has not been explicit in every case as to the intent requirement was simply because, until the growth of affirmative action concepts of civil rights in the 1960's and 1970's, no one in their furthest imagination believed that discrimination could possibly mean anything other than wrongful treatment of an individual because of race or color. It has only been with the development of affirmative action that anyone has relied upon statistical and results-oriented evidence to conclusively satisfy constitutional and statutory civil rights violations.

Finally, results proponents argue that the intent standard is impossible to satisfy. All that I can say to that is that, however impossible it may be, it has been satisfied in at least four major circuit court decisions since the *Mobile* decision. Just 2 weeks ago this standard was satisfied in two important decisions involving Alabama and Arkansas. Now we are hearing instead that it is "too difficult" to satisfy. At least we have moved from "impossible" to satisfy to "too difficult" to satisfy.

I would also note that the intent standard is satisfied every day of the week in courtrooms across the country in criminal cases, in civil cases, and in civil rights cases. It is a routine standard and one that has routinely been satisfied. As Irving Younger, perhaps the foremost authority on evidence in the country, testified.

> Opposition to the intent test has been practical. To enact it, the argument goes, is to make it difficult or even impossible to prove a violation. A practical objection, to be sure, but one which suggests to me that its makers lack practical experience in the conduct of litigation. Spend a few hours in any criminal court in the land. What is the stuff on trial? Almost always, a question of intent. In nearly all criminal litigation and in much civil litigation, a party must prove

the other party's intent. So far as I know, except for the matter before this subcommittee, there has been no serious contention that it is an unduly difficult or impossible thing to do.

As the Supreme Court has observed in Arlington Heights:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available.

In *Washington* v. *Davis*, it also observed:

> Necessarily an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.

In short, there is absolutely no obligation under the intent test to have to find a smoking gun, to have to read minds, or to have to ascertain the motives of long-dead legislators. Each of these descriptions of the intent test is totally misconceived.

Mr. Chairman, quite apart from the public policy aspects of the results test, I have no doubt in my mind that the changes in section 2 are wholly unconstitutional for reasons described at some length in the subcommittee report. Most significantly, however, what is involved here is an attempt by Congress to overturn a constitutional decision of the Supreme Court by simple statute. This is totally contrary to our structure of Government, in my view.

To set forth the basic facts as succinctly as I can: in Mobile and earlier decisions, the U.S. Supreme Court has stated expressly that the 15th amendment requires some demonstration of discriminatory purpose. This is constitutionally obligatory. Under the authority of the 15th amendment, Congress has enacted the Voting Rights Act. Now it is attempting to go beyond the constitutional limits of the 15th amendment and establish a standard more restrictive of State action than the 15th amendment allows. To the extent that the Voting Rights Act is predicated upon the 15th amendment and to the extent that the 15th amendment establishes a standard for violations, there is, in my opinion, absolutely no authority within Congress to act contrary to the Supreme Court of the United States.

I find it ironic that some of my colleagues are so worked up about efforts to overturn certain Supreme Court decisions by statute; *Roe* v. *Wade* comes quickly to mind. Apparently, however, there are exceptions to this rule when one disapproves of a high court decision. As some on this Committee may know, I have been opposed to efforts to overturn *Roe* by statute, despite my own views that *Roe* was a tragically wrong decision. Although I have heard the present situation and the situation involved in the abortion controversy distinguished on the basis that one involves a "limitation" of rights and the other involves an "expansion" of rights, I do not believe that this, or any other distinction, holds water. Either Congress can define the Constitution differently than the Supreme Court or it cannot; you cannot have it both ways.

Mr. Chairman, as you well know, a large number of efforts have been undertaken in the past few weeks to work out a compromise on section 2. To date, these efforts have failed. While I have been deeply involved in these efforts and regret this fact, I do think that some observers have mistakenly downplayed the enormity of the gap between the results test and the intent test. The difference is not one of cosmetics. Rather, it is a profoundly critical difference, critical in terms of philosophical understandings of civil rights and critical in terms of Federal-State relations, especially Federal court-State relations.

Speaking only for myself, I would be pleased if a compromise can be worked out, although I do believe that the straight 10-year extension of present law proposed by Senator Grassley and adopted by the subcommittee represents a fair compromise in itself. I am not, however, as some of the compromises seem to be premised upon, merely seeking to save face by being able to support a cosmetic results test so that we can claim victory. Now we have looked for an honest compromise; but, in my view, as long as everything has got to be run by the Leadership Conference for approval, we will probably not succeed in doing this. I must have heard this refrain a dozen times within the past several weeks.

Mr. Chairman, if the House amendments, or the Dole results amendment as presently drafted, are adopted into the Voting Rights Act, the question of race will intrude constantly into decisions relating to the voting and electoral process. Racial gerrymandering and racial bloc voting will become normal occurrences, given legal and constitutional sanction and recognition by the Voting Rights Act. Increasing rather than decreasing focus upon race and ethnicity will take place in the course of otherwise routine voting and electoral decisions.

This would mark a sharp departure from the constitutional development of this Nation since the Reconstruction and since the classic dissent by the Elder Justice Harlan in *Plessy* v. *Ferguson* calling for a colorblind Constitution. This would mark an equally sharp departure from the notions of discrimination established as the law of our land in *Brown* v. *Board of Education*, the Civil Rights Act of 1964, and indeed the Voting Rights Act itself.

I note with interest the remarks of the New York Times this morning by my distinguished colleague from Maryland, Mr. Mathias, in which he observes that the common interest on the part of proponents of the intent standard is that we all want to create a "homogenous" Republican Party. With all due respect to my friend from Maryland, assuming that he did say that, that again is utter nonsense. Indeed, it is precisely the opposite reason that motivates many of us on this side of the issue and certainly motivates me.

The flaw in the arguments of proponents of the results test is that they confuse the concept of minority representation with minority influence. While they profess to be concerned about maximizing the number of black individuals or Hispanic individuals or Aleutian individuals on a city council or a county commission or a schoolboard, they totally fail to recognize, in my view, that this may be entirely inconsistent with the idea of maximizing black or Hispanic or Aleutian influence on these representative bodies.

The proportional representation premise on the part of my colleagues on the other side of this issue implies, of course, the creation of district or ward systems of government throughout the country in place of at-large systems as well as other basic changes in municipal and State government structures. In a community with a 20 percent minority population and 10 city council seats, this, it is presumed, will be far more likely to insure two minority representatives than would an at-large structure. That may well be true, although I am far more reluctant than results proponents to assume that minorities will inevitably elect minorities to represent their political interests. I reject the idea that only blacks can represent blacks or that only whites can represent whites. In any event, the logical outcome of any ward or district system designed to insure proportional racial representation for minorities is that such minorities will, in effect, be clustered into what amounts to political ghettos. We will have two districts in this community with heavy concentrations of minority voters and may well elect two minority individuals to the representative body.

On the other hand, unlike at-large systems, in which all 10 councilmen would have to be responsive to a large degree to minority interests, under the system designed to promote proportional representation there would be eight councilmen who would not have to pay one iota of attention to minority interests. Potentially successful efforts at coalition building across racial lines would likely be blunted as racial lines were reenforced and emphasized by the proportional representation system.

The requirement of what, in effect, amounted to a quota system of representation would tend strongly to isolate and stigmatize minorities by departmentalizing the electorate into black districts and white districts and Hispanic districts and Aleutian districts. Minority members might well have more members of their race or ethnic group sitting on a city council, but their opportunities for exercising influence on the political system outside their districts might well be influenced.

I look at the House of Representatives, for example, and note that there is an 18-member Black Caucus. I did just a bit of research on this matter and noted that on the average each of the districts represented by these 18 members contains a minority population in excess of 80 percent. Now, if I were a member of the caucus, I might well be delighted with this state of affairs. I would love to have a district that was nearly totally homogenous in this respect. On the other hand, I question seriously whether minority influence as opposed to minority representation is maximized by this state of affairs. Might not, for example, the minority community in Detroit be better represented in Washington or Lansing if there were three minority districts of 30 percent each rather than a single 90 percent minority district? Might they not be better represented if they had fewer representatives who were black or Hispanic or Aleutian? I do not know. In this respect, I must strongly agree with Susan McManus, who testified that the results test:

> Would place a premium on identifying racially homogenous precincts and using those as the test. It seems to me that the inference is that racial polarization or having people in racially segregated precincts is the ideal. I find that very hard to accept as a citizen.

Professor McManus goes on to describe some real-world political negotiations with which she was involved in Texas:

> One faction of blacks led by several State representatives, the three black Houston city council members arguing for spreading influence among three commissioners rather than having a single black figurehead commissioner. State

> **Representative Craig Washington pointed out that three votes are needed to accomplish anything substantive. As long as we have 25 percent of the vote in any one district, we are going to be the balance of power. For that reason it is better for the black community to have voting impact on all three commissioners than to be lumped together in one precinct and elect a black to sit at the table and watch the papers fly up and down. Packing all the blacks in one district is not in the best long-term interest of the community.**

In my opinion, Senator Mathias is absolutely wrong in his suggestion that opponents of the results test oppose it because of their interest in a homogenous Republican Party. While my own primary interest in this area has nothing to do with partisanship one way or the other and is primarily related to constitutional concerns, I would suggest that, if a homogenous Republican Party was my objective, I would be delighted with the results test. I would be delighted with the opportunity, if I had this kind of a reasoning, to have tidy little districts in which all the minorities were placed. I would be delighted to have them in tidy little districts but many more of them in which nonminorities were also placed. I would be delighted to concede to minorities *x* or *y* number of seats and be able to concentrate the attentions of my party solely upon the rest of the seats, if I had this mentality. I would be delighted that I would not have to start my calculations in each district with consideration of what could be done to maximize support from or minimize opposition from the minority community.

I think that is abominable. Nevertheless, I think those who really want to minimize minority influence in this country would be delighted with the results test. In other words, if one's interest were a homogenous party of any sort, I can think of no better way to achieve that by removing what is today a predominately Democratic voting group outside the boundaries of 80 to 90 percent of the districts in the country and conceding them a measure of proportional representation.

Senator BIDEN. Will the Senator yield just for 1 second?

Senator HATCH. Yes.

Senator BIDEN. I am not suggesting he not finish his statement, but can you give us an idea roughly how much longer the statement would be?

Senator HATCH. I think I will probably be through in about 10 minutes.

Senator BIDEN. Fine. Thank you very much.

Senator HATCH. Again I apologize for taking this long, but I think it is important and, of course, am prepared to accord you the same.

Senator BIDEN. I agree.

Senator HATCH. I would be delighted, if I had that mindset, with the rule of the Justice Department developed in recent years that a district requires at least a 65-percent minority population in order to be classified as one "likely to elect a minority representative." With that kind of a mindset, I would be delighted not to have to start each and every congressional or State legislative or city council race 10 to 15 percent behind because of the presence of a minority group disproportionately attracted to my partisan opposition.

However, none of that is my interest nor, as far as I know, the interest of anyone else opposing the Senator from Maryland on this issue. I simply do not accept the premise of the Senate or that of the civil rights leadership in this country today that the interests of minorities are best served when narrow racial concerns are given predominant focus in the electoral process.

I believe, instead, that it is in the best interests of minorities, all minorities, that racial and ethnic concerns be subsumed within a far larger political context in which race does not define political interest, in which the two are not congruent. As Professor Edward Ehler of the National Humanities Center has testified:

> Transforming the Voting Rights Act into a vehicle of proportional representation through the results test will go far toward precluding the possibility of ever creating a common ground or common interest that transcends racial class considerations. How could the idea of racially identifiable wards or districts ever be looked upon as a civil rights objective? Has the civil rights movement evolved so greatly over the past decade that all hopes and ambitions of ever achieving a color-blind society have been discarded? Does anyone hold the slightest belief that results or effects analysis will do anything other than intensify color consciousness? How could the idea of a ten-year extension of the Voting Rights Act adopted by the subcommittee ever be viewed as anything other than the highest affirmation of civil rights? It was considered such only a year ago. It was only a year ago that Vernon Jordan of the Urban League said of the act that if it ain't broke, don't fix it. It was only a year ago that Benjamin Hooks of the NAACP testified in the House: We support the extension of the Voting Rights Act as it is now written. The Voting Rights Act is the single most effective legislation drafted in the last two decades. I have not seen any changes that were anything but changes for changes' sake. It would be best to extend it in its present form.

I understand that political positions change and evolve over time, but I simply do not accept as credible that the position unanimously endorsed by the civil rights community less than a year ago now reflects an anti-civil-rights position. That is not the intent of anyone that I know who opposes the House measure.

The Voting Rights Act has proven the most successful civil rights statute in the history of the Nation because it has reflected the overwhelming consensus in this Nation that the most fundamental civil right of all citizens, the right to vote, must be preserved at whatever cost and through whatever commitment required of the Federal Government. Proponents of the House measure would jeopardize this consensus by effecting a radical transformation of the Voting Rights Act from one designed to promote equal access to registration and the ballot box into one designed to insure equality of outcome and equality of results. It is not a subtle transformation. Rather, it is one that would result in a total retreat from the original objective of the Voting Rights Act, that considerations of race and ethnicity would someday be irrelevant in the voting process. Under the House-proposed amendments, there would be nothing more important.

I strongly urge the retention by this committee of the present voting rights law and the rejection of the House amendments, including what I understand to be the present Dole results test.

The CHAIRMAN. Senator DeConcini. I believe you are the ranking member on the Constitution Subcommittee.

I was going to take up these resolutions, but I am wondering if we have a quorum. I do not believe we have 10 rights at the moment. Senator DeConcini?

Senator DECONCINI. Thank you, Mr. Chairman. I will be brief.

I respect immensely the chairman of the Constitution Subcommittee. Indeed, I know how sincere he is and the efforts he has put forth and the diligence he has demonstrated in studying this matter. Although

Chairman Hatch and I differ on some of the central issues, I certainly commend him for offering a full and fair opportunity for all interested parties to express their views as well as for subjecting this important bill to the intense scrutiny that it has come under. I believe the bill withstood scrutiny well. During the course of the subcommittee hearings, S. 1992 picked up several additional cosponsors. Nevertheless, Chairman Hatch and others highlighted many reasonable concerns about the effects that this bill would have on States and local governments.

While I have never believed that the effects which Chairman Hatch has warned of, such as racial proportional representation requirements and per se invalidation of at-large elections, would come to pass under S. 1992—and, in my opinion, you can read the testimony delivered in a way that would demonstrate that it would not—I have believed that it might be helpful to make the language of the bill even clearer so that there would be no doubt as to the fact that the standard established by the results test of S. 1992 is the same as the vote dilution sstandard under such cases as *White* v. *Regester*, *Whitcomb* v. *Chavis*, and subsequent lower court decisions.

I am therefore pleased that the Senator from Kansas, Senator Dole, has worked with a number of us to put together another amendment presenting language for a results test in S. 1992 that affirmatively states that the test for a violation would be whether minority members have less opportunity than other members of the electorate to participate in the political process.

I believe that this language, plus assurances that proportional representation by race would neither be required of a jurisdiction when judging a violation nor imposed upon a jurisdiction when remedying a violation, answers effectively the concerns expressed during the subcommittee hearings. We said then that *White* v. *Regester* was our standard in S. 1992. We have drawn language from that case and placed it in the statute in order to establish that standard beyond the shadow of a doubt.

Mr. Chairman, I believe that this bill as amended by the language to be offered by Senator Dole will be the appropriate measure to assure every citizen of a full and complete opportunity to participate in the political process. As the Supreme Court noted almost a century ago, "the political franchise of voting is a fundamental political right," causing preservation of all rights. It is one of the core principles of government in America that all citizens have a fair chance to join in determining our national policy and goals. Today's effort and the effort of subsequent days to extend and strengthen the Voting Rights Act of 1965 symbolizes our national rededication to this principle. Thank you, Mr. Chairman.

The CHAIRMAN. The Senator from Massachusetts, Senator Kennedy.

Senator KENNEDY. Mr. Chairman, first of all, I want to express my appreciation to the chairman of the subcommittee, Senator Hatch. I was not a member of that committee, but I did attend a good many of the meetings. I was accorded all the privileges of a member of the committee. I am grateful to Senator Hatch and the other members of the committee for that courtesy.

I want at the outset to note your commitment, Mr. Chairman, in moving this bill through the committee without delay. The commitment that you gave us several weeks ago when we were taking action on the contributions bill was that we would start on the markup of the bill today or, rather, yesterday and that we would continue on it tomorrow and Friday and so forth until we are done. I appreciate that commitment. I am sure my colleagues do.

We all know that this is not an ordinary bill. The judiciary docket does have other legislation pending; but, if necessary, we can work this week and finish the bill before the next scheduled markup. In fact, it should not take more than a few days to complete our work. We know that the budget matters are coming to the floor soon. They and other must legislation will take us well into the summer. We know it is imperative that we process this vital measure before the distorting triphammer pressure of an August 6 deadline is hanging over our heads.

I think we all know that the budget resolution is due on May 15. Then we are going to have the debt ceiling debate probably sometime in the latter part of May. So, we are going to have a very full schedule.

We anticipate some debate on the floor. We must move this bill to the full Senate, hopefully, by the end of this month in order to have it considered by our colleagues in an orderly and unpressure fashion.

So, I thank the Chair for all of his efforts to see that this is accomplished.

We need not belabor the importance of our work today and in the days ahead. Our task is no less than the responsibility to insure that the hard-won progress of the past is preserved and that the effort to achieve full election participation for all Americans in our democracy can continue effectively in the future.

The Voting Rights Act has rightly been hailed as the most important civil rights law of this century. We all know the impressive statistics of the gains made under the act. The hearings held both in our committee and in the House last year indicate the danger of losing the act's crucial safeguards when many of those gains are still fragile, and there is still much left undone before we have true equality of opportunity to vote and have one's vote count fully, for all of our citizens.

Twice before, the act has been endangered, and, twice before, Congress has come to its rescue on a bipartisan basis.

In the debate we will hear some of the arguments—and we have heard a number of them this morning—that Congress has already heard and rejected in past renewals. We will hear about the progress we have made. But I think there is a broad consensus now both in this city and across the land that the act, including section 5 preclearance, needs to be extended. The record again has been made that there are still too many problems, too many continued efforts to thwart full voting rights, and too many dangers, to eliminate those safeguards.

It is also clear that we must extend the bilingual election provisions to insure that Americans not be denied their right to vote because of language difficulty with the ballot.

Much of the debate in the committee's hearings has dealt with section 2 of the act. The chairman of that committee has commented extensively about that provision today. The House bill, which was passed overwhelmingly and which Senator Mathias and I have introduced, now has 65 cosponsors. It contained a clarification of the language in section 2 in order to resolve the confusion caused by the welter of Supreme Court opinions in the *Mobile* case.

We will be discussing section 2 in detail during the markup, but I think we should not lose sight of the forest for the trees. The fundamental issue is one of fairness. We are at a crossroads in setting the course for the elimination of remaining election discrimination. We can take the path in the House bill and adopt the results test. That would permit minorities to challenge practices which shut them out of a fair chance to participate in the electoral process. Or we can take the path suggested by some and require proof of intent. That road takes us down the path of name calling, identifying public officials or whole communities as racist. It is divisive but, more important, it will not provide an effective tool to challenge discrimination in many cases because it is too hard to prove or because defendants can come up with some alternative explanation.

I believe that the overriding principle is simple and obvious. We are talking about the most fundamental right, which is the basis of all others in a democracy. If a minority citizen is denied equal opportunity to participate and is shut out from a meaningful role in the process, then that inequity should be corrected, regardless of what may or may not have been in someone's head 100 years ago.

The House provision on section 2 is reasonable. The horror stories we have heard about racial quotas have been laid to rest in the hearings.

There has not been one Supreme Court decision on this issue. Those that make these statements and comments out of hand about the language that has been developed in the *White* case mandating proportional representation cannot show that by court holdings, quite to the contrary. As one who has been listening to that argument over some period of time and hearing it repeated time in and time out, and I am sure we are going to hear it on the floor, it is beginning to occur to me that these are scare tactics which are being offered to try and alter and dramatically change what has been a very carefully protected right for citizens of this country. There is not one case requiring proportional representation.

The House provision on section 2 is reasonable. The horror stories we have heard about racial quotas have been laid to rest in the hearings. The House bailout provision is a reasonable, fair, and carefully crafted provision. It substantially liberalizes the opportunity for covered communities to end their preclearance obligations. Further weakening of it could turn the bailout into a sieve and constitute a backdoor repeal of section 5.

These are the basic outlines of the record that has emerged from the hearings, Mr. Chairman. I hope we can move the bill with speed but also with sensitivity to the fact that we are dealing with the fate of American citizens' right to participate fully in elections. Let us keep in mind, as we talk about making slight adjustments or fine-tuning provisions, we are talking about real people in real communities who are being shut out of a chance to participate in any meaningful way in the political process.

I believe that, if we can keep that point in mind, this committee will report a fair and strong bill to our colleagues in the full Senate so that the long-delayed march toward full voting rights can continue.

I would finally say, Mr. Chairman, that I think the issue is very basic, very fundamental, and not very complicated. The real question is whether we as a Senate want to make it possible through striking down the various barriers which have been established for citizens of this Nation in their efforts to vote, whether we want to make that easier or more difficult. Do we want to make it easier, or do we want to make it more difficult?

We have the power. We have the power and, I believe, the responsibility, but certainly the power. It has been held by the Supreme Court in case after case in enforcing and bringing life to the 14th and 15th amendments to pass legislation which will achieve those noble objectives. The real question is whether we have the will and whether we believe that we as a Congress ought to make it easier for people to participate in the election systems of this country or whether we want to make it more difficult.

If you want to make it more difficult in 1982, then you are going to vote for the intent recommendation. We do have a requirement for intent in criminal cases, but we do not have it in civil cases and we do not have it in other areas of the civil rights laws and issues of employment, issues of housing. That is going to be the crux of the issue which is before this committee.

Finally, we heard during opening statements that the Congress had the opportunity when we passed the 65 acts to put in a results test. Well, the Congress did not put in an intent test either. I wish we had put in a results test.

I am satisfied with the statements of Attorney General Katzenbach and the statements of the leaders of the House and Senate at the time of the renewal of the act that the legislative supports the results test. But I do not think that that is a very strong point.

There are two final matters that I would mention since there was such an amount of time given to the issue of proportional representation. A variation of the proportional representation theme is the claim that the results test would bring wholesale challenges to election systems everywhere. This claim was fueled by the testimony of the assistant attorney general who testified to this effect even while ignoring a comprehensive study done by the Justice Department less than 4 years ago. The assistant attorney general's testimony was based exclusively on a sketchy error-filled survey of a handful of carelessly chosen cities; almost every one had been thoroughly analyzed already in 1978. Those errors consisted of mistaken population figures, errors in the number of minority elected officials, as well as ignoring the careful analysis that most of these same cities had previously undergone.

In 1978 in response to urgings that the Justice Department look at possible cases of voting dilution in areas outside the specially covered jurisdiction, the Department did an analysis of more than 200 cities throughout 40 Northern and Western States to see whether vote dilution cases should be considered there. Based on the initial study, a number of cities were selected for more detailed investigations. In almost every case, these too were found by the Justice Department not to warrant litigation. They did not warrant litigation because they did not meet the dilution standards of the *White* v. *Regester*, which is the test which is included in the Mathias/Kennedy proposal. The Department analyzed these facts, the case which would be restored by amended section 2.

This comprehensive study covered every one of the cities mentioned by Mr. Reynolds except for two, which were in Southern States. One's black population was under 5,000. Yet, Mr. Reynolds did not even refer to the study in offering his cavalier statements that all these cities would be vulnerable to challenge. And we heard that statement and charge again today.

The Justice Department study done under the existing law in detail and then we hear these cavalier statements about various communities being subject, if this test is accepted, that they will be challenged. One city that he specifically mentioned was Cincinnati. Yet, Cincinnati was one of the cities that was looked at in depth by the Justice Department. The conclusion was as follows: In like manner, Cincinnati, Ohio, was the subject of vote dilution investigation by the Civil Rights Division; but, once again, the division did not discover the facts necessary to institute a lawsuit under the *White* v. *Regester* standard—Assistant Attorney General Robert McDonnell to Representative Hyde, July 9, 1981.

I think I would like to ask—I know there are other statements, but I would ask the chairman of the subcommittee whether he can name one case under the *White* v. *Regester* of the more than two dozen cases where the court required quotas or proportional representation, even one case.

Senator HATCH. White was a case involving purposeful conduct. That is what the Supreme Court has said. That is what Justice White, its author, has said. It was decided on that basis. It was not decided on the basis of a results test.

I just submit to my good friend and colleague—and I appreciate his kind remarks at the outset of his statement—that he has misconstrued the case.

That case involved purposeful conduct. I do not see how anybody can read it any other way, especially since the Supreme Court has ruled that it does.

Senator KENNEDY. Just on my question, not on your interpretation of the *White* case, you have stated this morning in a long, detailed statement about the dangers under that particular case of proportional representation. I am asking you to name one case which has supported that thesis, one.

Senator HATCH. Well, *White* v. *Regester* says——

Senator KENNEDY. On the proportional representation issue.

Senator HATCH. Let me say this——

Senator KENNEDY. On the proportional representation issue. We will get back to the law about intent, I mean the results test and the purpose. We will get back to that. I will not take the time of the committee. But just on the proportional representation.

Senator HATCH. That, Senator, is not the question. There has never been anything but a purposeful consideration of purposefulness in these cases. In spite of what the Washington Post and the New York Times may say, the effects test has never been the standard. It has been intent which has been the standard.

I cite the *Mobile* case:

> *White* v. *Regester* is thus consistent with the basic equal protection principle that the invidious quality of the law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.

That was the issue in *White*, in *Mobile*, and in other 14th amendment, 15th amendment, and section 2 cases.

The question is why now are proponents of the House bill arguing to overturn what has been the settled law in this area, a law which has worked well. What motivates this effort?

Let me point out further——

Senator KENNEDY. Mr. Chairman, I can with——

Senator HATCH. Perhaps even more compelling is the fact that Justice White, who dissented in *Mobile*, and who authored the White opinion, agreed that it was consistent with the intent or purpose requirement. Justice White disagreed with the Court's opinion in *Mobile* because he believed that the plaintiff had satisfied the intent or purpose standard, not because he disagreed with the standard itself. In his dissent, he said:

> The court's decision cannot be understood to flow from our recognition in *Washington* v. *Davis* that the Equal Protection Clause forbides only purposeful discrimination. Even though Mobile's Negro community may register and vote without hindrance, the system of at-large election of city commissioners may violate the Fourteenth and Fifteenth Amendments if it is used purposefully to exclude Negroes from the political process. Because I believe that the findings of the district court amply support an inference of purposeful discrimination in violation of the Fourteenth and Fifteenth Amendments, I respectfully dissent.

So, I would respond to the Senator: Where is there a case, a Supreme Court case, where the results test was employed? There just is not any.

Senator KENNEDY. The fact is, with all the scare language, the results of the *White* case, those that bring up the scare tactic of proportional representation cannot show that there has been a single case that has required proportional representation——

Senator EAST. Would the Senator yield for a question?

Senator KENNEDY. I wanted just to come back to a final question——

Senator HATCH. And I would like to answer this one.

Senator EAST. I would like to show that currently in North Carolina today they are, because of section 5 of the 1965 Voting Rights Act, we are under a PR test. The Senator from Utah, in my judgment, is absolutely correct. If we take the Kennedy/Mathias bill section 2 and apply it nationwide, Senator, I would argue very strenuously that you are going to have proportional representation. And I can quote here from our newspapers. That is currently what is being required by the Justice Department because they say under section 5 of the 1965 Voting Rights Act that that is what is required. Let me just quote here briefly, Senator, since you challenge the integrity of our position.

We are told here, this is a direct quote from William Bradford Reynolds:

> Our analysis shows that during the Senate Redistricting Committee's consideration—talking about the State Legislature of North Carolina—of this district—which is in northeastern North Carolina—it was widely recognized that at least a 55 percent black population was necessary if black voters were to have a reasonable chance of electing their candidate.

Currently under the redistricting plan, it is 51.7. Now, it is quite clear that that is moving you in the direction of proportional representation. We cannot have at-large districts. We must have specific single-member districts. The logical terminal point, as the Post has previously pointed out, is PR.

I greatly respect the eloquence and the reasoning power of the Senator from Massachusetts, but we are on sound ground in terms of the southern experience when we say the logical terminal point is PR; and it is a bad concept. I commend the Senator from Utah for holding firm on that.

Senator HATCH. With the Senator's indulgence, let me just say this: The reason there are few cases utilizing proportional representation before *Mobile* was simply because the results test had not been the law. I will give you one illustration, however, where it was used in applying the effects test pursuant to section 5: *City of Port Arthur* v. *United States*. This was a municipal annexation case in which the court stated:

> The conclusion reached by this court is that none of the electoral systems proposed by plaintiff, Port Arthur, affords the black citizens of the city the requisite opportunity to achieve representation commensurate with their voting strength in the enlarged community. Blacks comprise 40.56 percent of the total post-expansion population, and we estimate that they constitute 35 percent of the voting-age population. None of the proposed schemes offer the black community a reasonable possibility of obtaining the representation which would reflect political power of that magnitude.

In addition, I would suggest that my friend from Massachusetts also read the Supreme Court decisions in *Richmond* and *Petersburg*.

Senator KENNEDY. We will have a chance to get into those. I still stand by the earlier statement with regard to lower court holdings, courts of appeals, or the Supreme Court.

I would like to end with this question. If you can show, since you have indicated that the *White* test was a purpose test, can you show us the pages in the opinion where the court discusses the purpose behind the adoption of the at-large——

Senator HATCH. I do not need to because in *Mobile* two Justices say——

Senator KENNEDY. *White* is the test which we have accepted as the base. I am just asking you, and you have talked about *White* as the purpose test. I would just like you to point that out for me. Where in the opinion?

Senator HATCH. What better way can I do it than by having two Justices say that is exactly what——

Senator KENNEDY. Show us.

Senator HATCH. It is explicit in *Mobile* that the Court viewed *White* as an intent case. It is also explicit in Justice White's dissent in *Mobile* that he, as author of *White*, viewed it as an intent case.

Now, let me throw that back to you. Show me a Supreme Court case where the results test has been found to be the applicable test under section 2 or the reconstruction amendments. I have seen in the newspapers time and time again how this has been the law, the effects test or the results test. Show me where it is. Show me where. There is not a case anywhere, certainly not a Supreme Court case.

Senator **Kennedy**. I am not going to take any other time. I have the opinion here. If you can show us any part in the opinion of White where the court discusses the purpose behind the adoption of the at-large election issue, I would welcome that.

We will have another time. There are others who want to speak.

The **Chairman**. The Senator from Iowa.

Senator **Hatch**. Senator Grassley, would you yield for just one statement?

Senator **Grassley**. Sure. I can stay here all day.

Senator **Hatch**. We may have to.

What I see is that Senator Kennedy disagrees with at least six Justices in the *Mobile* case who say that White requires an intent test, and disagrees with the author of the *White* case, Justice White himself. In other words, if you could show me where the Supreme Court has accepted a results or effects test in section 2 cases, I would feel like you would be a long way toward making your case. But you cannot do it.

Senator **Kennedy**. There are a number of cases prior to *Mobile* which the Supreme Court found unconstitutional discrimination and election systems without requiring the proof of intent. For example, in *Fortson* v. *Dorsey*, 1965, the court found multimember systems might be unconstitutional; if designed or otherwise, was the language that was used, it operates to minimize or cancel out the voting strength of racial or political——

Senator **Hatch**. What section was being applied in that case?

Senator **Kennedy**. The 14th amendment.

Senator **Hatch**. The 14th amendment. It was not a section 2 case. It was not even a 15th amendment case.

Senator **Kennedy**. You just asked about the 14th——

Senator **Hatch**. But it is not a voting rights case. It is not a 15th amendment case. It is not applicable to this.

Senator **Kennedy**. It is a voting rights case.

Senator **Hatch**. Not under the 15th amendment.

Senator **Kennedy**. Fourteenth or fifteen amendment was the question that the Senator asked.

And in 1966, *Burns* v. *Richardson*, the court again said a system that operates designedly or otherwise to minimize or cancel minority strength.

Then in *Whitcomb*, 1971, the court noted at the outset that there was no proof of intent and then, nonetheless, went on to discuss the effects. The plaintiffs admitted that, but the court went on to discuss the effects.

So, there are other cases, too.

We will have a chance to get into it.

Senator **Hatch**. We will get into it.

Senator **Kennedy**. I am glad that we were able to give a result on the results test, and the Senator was not able to on the purpose test nor show where there was proportional representation.

Senator **Biden**. Mr. Chairman, may I make an inquiry?

The **Chairman**. Yes.

Senator **Biden**. I am not anxious to close down this exchange at all. Are we going to have an opportunity to make the opening statements that those of us wish to make? Two minutes for me, whenever.

The CHAIRMAN. We intend to allow an opportunity. Senator?

Senator EAST. Mr. Chairman, since we have no quorum here any longer and considering the importance of this matter, I question whether we ought to proceed any further.

Senator BIDEN. Mr. Chairman, I would suggest——

The CHAIRMAN. We can generally proceed if we have 9 for just discussion, but the vote would have to have 10, a majority. How many have we now?

Senator EAST. We have dwindled now to a small bank, Mr. Chairman. I had some remarks I would like——

The CHAIRMAN. How many have we now?

Senator BIDEN. We have five. Mr. Chairman, I would——

Senator GRASSLEY. I am prepared to give my remarks if I am the only one here to give them.

Senator BIDEN. So am I, Mr. Chairman. I would suggest we have the major players in this. The rest agree. The people who are here—when I say major players, the major players who disagree on this issue. So, it makes sense. We are making progress.

The CHAIRMAN. If there is no objection. If there is objection, I will have to call it now. But, if there is no objection, those who have not given their remarks, and I understand they will be brief——

Senator EAST. I object. I object, Mr. Chairman.

The CHAIRMAN. Senator East objects.

Senator GRASSLEY. I do not know why you would want to object as long as we do not care if there is anybody here not to listen to our statements.

Senator EAST. If the Senator would let me explain. Reserving the right to object, Mr. Chairman. If the Senators would allow me to explain why I am concerned about going on without a quorum, I would be delighted to do so. But I cannot help if I am not allowed to explain.

Senator BIDEN. Please explain.

Senator EAST. Could I explain why I am concerned about it?

The CHAIRMAN. Go ahead.

Senator EAST. Mr. Chairman, I had indicated several weeks ago that I appreciated the desire of the chairman and, I think, certainly the members on the opposition side and many others, too, to move this thing through in an orderly, deliberative process. I, for example, have refrained from any "holdover" on it, which I could have exercised the right to do, a delay tactic.

I have been here at every meeting. I was the first one here this morning at 20 minutes to 10. Now, I am not asking for credit for that. I have been here the entire time. To me, the importance of this is enormous. It may be the most fundamental piece of legislation we will deal with this year in terms of its impact not only in the South but in the country as a whole. If ever the Senate should utilize the deliberative process of the great deliberative body, it ought to be on this one.

The idea that, well, everybody else knows where they stand on this thing; we just kind of move all these statements through and throw it in the record. I do not consider that the great deliberative process at all, Mr Chairman.

I have grievances other than strictly the effects and intents test: venue, burden of proof, nationwide application, et cetera. They are going to be fair amendments. I do not expect to take an inordinate amount of time. But I would expect to have the attention of my colleagues so they might hear my position and see if there is any legitimacy to it. I have been sitting here this morning listening to every Senator speaking, including the distinguished Senator from Massachusetts. I am willing to listen to them, but I think I am entitled to be heard by a quorum of this committee.

The implication that I am some way or other an obstructionist because I will insist upon a quorum, I submit, Mr. Chairman, it is the other way around. If these gentlemen genuinely want to debate this bill, they will be here and participate in it. I will be here, and I will tough it out. I will come anytime, any place, for any length of time that you need me for a quorum. I think that is fair, eminently fair.

I would like to proceed on that basis. That is why I am objecting now to proceeding——

Senator **Biden**. Before you object, reserving your right, all that the Senator from Iowa and I are saying is we do not have anything that is debatable. We just want to state at the outset how we think we should or should not proceed. That is why we are not debating the subject. And I would hold that until we have a quorum.

Senator **East**. I am still reserving my right to object.

Senator **Biden**. That is fine. Go ahead and object and let us get on with it.

Senator **East**. What I am saying is we have already seen with the very fine exchange between Senator Kennedy and Senator Hatch that we are already deliberating this. We are already into it. Now, you might say that these are just "opening statements." They are more than that, Senator. We are now in the deliberative stage of this very important bill.

Senator **Biden**. Mr. Chairman, I do not want to speak——

Senator **East**. I have a very modest request that we have a quorum before we continue on with our discussion.

Senator **Biden**. Fine.

Senator **East**. Unless someone convinces me to the contrary that that is unreasonable and obstructionist, that is what I would like to do, Mr. Chairman.

The **Chairman**. The point is up here. You have a right to do that. You have a right to have a quorum.

I was just thinking, I wonder if we could get a quorum here. We intended to stop at 12:30 and come back at 2:30. If we can get a quorum here before 12:30, we can continue. Do you want to do that or just come back at 2:30? What are your wishes?

Senator **Biden**. Mr. Chairman, I will be back; but at 2:30 there is a meeting of the Covert Action Subcommittee, the Intelligence Committee. They tell me there is a very important matter that I have to vote on. So, I can be back here by—I am not suggesting we delay the time. But I will not be back here until closer to 3 o'clock because I must vote on that covert action.

The **Chairman**. Is there objection to coming back at 3 to accommodate the Senator?

Senator **Biden**. No, there is no need to do that because others will have things to say. I am just telling the Senator it is not because I am not interested. I will not be back until close to 3; 2:30 is fine as far as I am concerned.

The **Chairman**. We will now stand in recess until 2:30.

[Whereupon, at 12:15 p.m., the committee recessed, to reconvene at 2:30 p.m. the same day.]

AFTERNOON SESSION

[Whereupon, at 3 p.m., the committee was reconvened, Hon. Strom Thurmond, chairman of the committee, presiding.]

The **Chairman**. Senator East wanted a chance to extend his points of view this afternoon, but there are only four Senators here; we do not have a quorum, and we waited 30 minutes.

Where are the proponents of the voting rights bill?

[No response.]

The **Chairman**. I repeat: Those who want the voting rights bill, where are you?

Senator **East**. The cameras are gone, Mr. Chairman.

The **Chairman**. Well, anyway, we waited half an hour. I think we waited a reasonable length of time.

Senator **Hatch**. Mr. Chairman, would you yield?

The **Chairman**. Senator Hatch?

Senator **Hatch**. Yes. I personally believe that it is important that a record be made. That is why I took the time I did this morning. I do not inted to take a large amount of time henceforth, but I think it is important for the chairman of the Constitution Committee to put in the record his views on this. I feel strongly and deeply about it, and so I did.

I personally feel we ought to proceed with statements into the record. I am disappointed that our colleagues are not here. It seems to me that the burden is on the proponents in this matter to come out and make a case for this. The subcommittee has voted a simple 10-year extension. I resent media reports describing this as the "Hatch bill" or the "Hatch amendment." This is not my bill. Only last year, everybody was saying, if they just had a simple extension, they would be happy with it.

Now, we have given them that. I think that is what should be done; I have felt that from the beginning. But the fact of the matter is I do believe that those who are promoting the House bill have an obligation to be here and defend it. I intend to try and be here as much as I can to answer questions or to do whatever I can to try and enlighten my colleagues.

But if we cannot get a quorum, I wonder if there would be any objection to putting statements into the record in any event, because then we can make this record and then as soon as we get a quorum, vote.

The **Chairman**. Well, maybe the cameras will be here tomorrow and we will have a quorum.

Senator **East**. Mr. Chairman?

The **Chairman**. So, you take as much time as you want.

Senator **Hatch**. Well, I am through.

The **Chairman**. And I will give them as much time; I will give it to the opponents, too. I want to be fair to everybody. We are not going to try to just cut people off.

Senator **Hatch**. No, no; I am not suggesting that you are, Mr. Chairman.

The **Chairman**. But, tomorrow, if you want to finish your statement, feel free to do it. Senator East will have the same opportunity; Senator Grassley, too, and the people on this side. We are going to give everybody an equal opportunity.

It is a strange anomaly to me that the people who are pushing this bill so and could not wait to have a hearing—I do not see where they are. There is not one of them here this afternoon; not one of them.

Senator **Grassley**. Whereas this morning I expressed the view that I would give my opening remarks whether there was anybody to listen to them or not, I have changed my mind and I would like to have an audience. [Laughter.]

The **Chairman**. I think you are entitled to an audience, and I suggest that you be here tomorrow, and maybe the cameras will be here and maybe it will be a better time to present your side.

As I say, we want this to be a balanced hearing, but it is strange that not a single proponent of the House bill is here at this meeting. So, in view of that, we stand adjourned until 10 tomorrow.

[Whereupon, at 3:05 p.m., the committee was adjourned.]

EXECUTIVE SESSION CONSIDERING VOTING RIGHTS ACT

THURSDAY, APRIL 29, 1982

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The Chairman. The committee will come to order.

We cannot have any votes unless we have a quorum, but we have at least nine.

We have 10 now. We have a quorum.

We will continue on this Voting Rights bill, Senator?

Senator Biden. Mr. Chairman, with your permission, if I could take 2 minutes for some procedural points. Obviously, we have a number of very critical issues before the Senate. There is probably going to be continuation of standing objection to the committee meeting beyond the 2-hour limit after which the Senate comes in.

I would like to propose the following for consideration by the chairman: That, A, the chairman and I after the next vote try to corral the Democrat and Republican leadership in the Senate and see whether or not next week it looks like we can get them to come in a little bit later and us go in a little bit earlier; second, whether or not that is successful, for you and I to consider proposing to the committee after consultation the prospect of setting an evening or two next week that, when the Senate goes out, we would sit through, as we do often in the Budget Committee on a regular basis, unfortunately, and, I assume, the Finance and other committees in case we cannot break the logjam in terms of the Senate rule of continuing to meet so that we would be able to meet into the evening.

Last, whether or not we are in tomorrow, I think we should consider the prospect of us being able to meet tomorrow. I realize that is a great inconvenience to all of us, myself included; but, if we can work out some definite times for Monday, Tuesday, Wednesday nights and/or get commitments from the leadership to go in a little later, then we may not need to do it tomorrow.

I would like to suggest that, with your permission, you and I after this adjourns sit with the leadership and discuss that. Is that reasonable?

The Chairman. I would be glad to talk to you about it. We do not want to delay this matter. It is a very important matter. On the other hand, I do not think we need to unnecessarily rush it. On account of the rule, I think we may have to take some other step.

Several Members have told me they have got to be away. I do not think we can have a meeting tomorrow. I think we had better meet

Tuesday and see if we can make progress; if we do not, we had better probably arrange some night meetings.

Senator **Biden**. I agree.

I would like to point out to my colleagues on the committee that—Senator Dole could point it out much better than I, actually—we are into the budget season. Things are going to really be difficult from here on out. If we do not get this thing up and out and on the floor before we get an opportunity to have to move on the budget on May 15, we are going to have some real problems.

I want to say, and I mean this sincerely, that the chairman has been absolutely a man of his word. He has not in any way been dilatory on this. I compliment him for that. I just think we are going to find ourselves in a logistical logjam unless the chairman and I are able to convince the Senate leadership that we are going to have to accommodate some time. But your assurance that we talk about that is good enough for me. We will move from there.

Senator **East**. Mr. Chairman, I would just offer the caveat in doing that that we have already now had several meetings on this like yesterday afternoon, and we did not have a quorum. You and I were here and Senator Grassley and Senator Specter. Excuse me if I have left out somebody else. Nobody else showed up. Yesterday morning, when we were to meet at 10, we did not have a quorum until around 11. I am not faulting anybody, but I am saying there is always a lot of thrashing around here about: Well, let's have more times to meet, evenings and so on and so forth. And then you can set up those times. The old faithful will show up, and we are still back where we were.

I would think the more critical thing is not opening up more opportunities for meetings but for people arranging their schedules to be at the ones we have.

Senator **Biden**. I can guarantee to you, Senator, we will produce all the Democrats.

Senator **East**. Then we had yesterday morning. We spent more time lamenting how we might plan new meetings; if people would commit themselves to being at the ones we have.

I do not mean to sound overly exasperated, but I share the exasperation of the distinguished Senator from Delaware. I am simply pointing out the track record to this date of attendance at meetings held during the day at reasonable times when we did have a good little nucleus here, the others were not here. Bless them, they probably had great conflicts on their schedules; I understand that. But you get into evening meetings and all that, what guarantee is there you are going to have a greater attendance?

Senator **Biden**. The guarantee is experience, Senator. The guarantee is that in the Budget Committee, in the Finance Committee, in every other committee that has to deal with monumentally larger pieces of legislation they have found it is the only time Senators can clear their schedules. For example, I imagine it would be very difficult for Senator Dole to tell the President: I didn't have time yesterday to sit down and talk with you about that budget matter; I've got to go to the Judiciary Committee and work that matter out. I imagine it would be very difficult for us to say at 5:30 to Secretary Haig: We don't have time to talk about the Falkland Islands because of convenience to you, and so on and so forth.

Without my getting myself overly concerned about this thing, experience shows around here that the only time that you can guarantee to get people is when the Senate is not in session. The worst time to get people, especially on short notice, is to interrupt the afternoon portion of any Senator's schedule because of other committee meetings, floor action, and appointments.

I will not talk anymore. We will work it out.

The CHAIRMAN. I think we can handle it.

Senator HATCH. I certainly hope that everybody on this committee will be prepared to meet and resolve this issue, because it is an important issue. I think those who have amendments ought to bring them up and let us vote on them, so we can resolve them one way or the other. I hope, too, that all of us will be able to find the time, and that both the chairman and the ranking minority member will be able to come up with an approach that will help us get to the end of this committee process and get this bill on the floor. I just feel this has to get done.

The CHAIRMAN. Senator Dole?

Senator DOLE. As I understand, the chairman wanted everybody to make their opening statements and then have amendments. Or should we offer amendments now?

The CHAIRMAN. I think the statements would come first. Senator East said he has a statement. Senator Leahy, do you have a statement?

Senator LEAHY. Mr. Chairman, I have one comment. Before we get too exercised about when we meet and how serious we might be, let us be honest about one thing. So long as we are in the position where we are still talking about giving opening statements and no votes—and I am not suggesting those opening statements are not important; of course they are important; every Senator has a right to make them. But, as long as all we are doing is going to be talking about this bill, and we know that is all we are going to be doing, talking about the bill, we are not going to have quite the attendance. Much as we like to hear each other speak and it is thrilling and scintillating and a great experience, the attendance is going to be when we actually sit down and start voting on this.

The credibility we are going to have as a committee determined to get this bill on the floor is going to appear when we are actually voting on those amendments and on the final bill and getting it on the floor. That is when our credibility and our commitment is going to show through.

The CHAIRMAN. It is my hope to get this bill out of this committee by next week.

Senator LEAHY. I commend you for that, Mr. Chairman.

Senator BIDEN. We are all going to sit and listen to all the statements. So, let us go, Mr. Chairman.

The CHAIRMAN. Before we start the statements, is there any objection to these commemorative resolutions we have on here?

Senator HEFLIN. Do not record me for snowmobiles.

Senator LEAHY. That is the best one we have on there. [Laughter.]

Senator HEFLIN. I am in favor of it.

The CHAIRMAN. As far as I know, there is no objection to those. They were on the agenda yesterday.

There being no objection, they stand approved.

Now we are ready to go into this matter. We have to go here for just 10 minutes, I guess, and come back.

Senator **Dole**. We cannot come back after 11, can we?

The **Chairman**. No.

Senator **Dole**. We have a standing objection.

The **Chairman**. Somebody has raised an objection.

Who wants to make a statement for about 15 minutes or 10 minutes?

Senator **Biden**. We will all sit here. I would like to hear Senator East's statement. We will all stay right here.

Senator **East**. You are going to get a chance.

The **Chairman**. Senator Grassley, did you have a statement?

Senator **Grassley**. Mine is going to take longer than 15 minutes, and I do not want to go now.

The **Chairman**. The Senator from Vermont.

Senator **Leahy**. How long do you want? I have a Vermont statement and a Senate-type statement. [Laughter.]

The **Chairman**. You have to keep quiet. After all, you are guests of the committee when you are in the room. We expect to have order. You are not to show any approbation of decisions or remarks made by the committee members.

Senator **Leahy**. Mr. Chairman, I appreciate that. I should note at the beginning, incidentally, that I would hereby make an open invitation to Judge Heflin, in light of his kind cosponsorship, to come to Vermont next winter and go snowmobiling with me. It would be an experience that he would not soon forget.

Senator **Heflin**. Do you reckon I would survive? [Laughter.]

Senator **Leahy**. Mr. Chairman, it is unlikely that any visitor to this committee chamber or an observer sitting in the Senate gallery would characterize us as a group of revolutionaries. Yet, the Congress less than 20 years ago accomplished through reason and debate what most other societies have only been able to bring about through violence and bloodshed, the enfranchisement of a minority that began here as slaves and prior to 1965 were still second-class citizens in many parts of the country.

This morning we take another step in that peaceful revolution. As the first Voting Rights Act was a product of its time, so is the bill we have before us today. In reenacting this critical legislation, it is important to note that the work of the Voting Rights Act is not complete, and the idea that the franchise is available to all Americans equally has not yet become a reality.

I support S. 1992 as introduced, which is the same bill that passed the House by a 389 to 24 vote. The House wrestled for a long time over the issue of preclearance under section 5 of the act. Under the present law, all jurisdictions become eligible for bailout at the same time, and a State that is entirely covered is required to bail out as a unit. Based on actual experience, these provisions seemed unfair to many House Members, and they called for improvements.

But it is one thing to improve the preclearance section of the Voting Rights Act and quite another to even think of eliminating it, either explicitly or through so-called improvements that disable it.

Section 5 of the act was the force that made the Voting Rights Act of 1965 work, where earlier laws in 1957 and 1960 seemed to founder. The requirement to preclear voting changes was the beginning of a process that saw more than a million black Americans register to vote between 1965 and 1972. No longer could a State hope to retain discriminatory election schemes by fighting in court year after year after year, only to shift to another equally discriminatory scheme when the first one was shot down by a Federal judge. Preclearance meant that the apparently neutral change in a voting law that actually discouraged or prevented minority citizens from casting their ballots would be scrutinized before it took effect.

Section 5 has not proved to be the bureaucratic nightmare that was sometimes predicted, or, quite frankly, hoped for back in 1965. The past record of the Justice Department through several administrations, Republican and Democrat, has been exemplary, with plainly nondiscriminatory changes being processed in 60 days or less in most cases.

It is understandable, nevertheless, that States and counties that have eliminated discrimination want to bail out the section 5 process, however fair and expeditious it may be. There are some who fear that the compromise worked out in the House on the bailout issue is too easy to use and that the bailout will be too broad. There was criticism in the Constitution Subcommittee hearings that the tests are too stringent. I believe that liberalized bailout is a chance worth taking, because it stresses initiatives that States and counties can take to eliminate discrimination and does not simply wait for the passage of time. The bailout compromise is a product of experience and hope, and I support it fully.

Perhaps the major issue before the Judiciary Committee is the question of intent under section 2 of the act. If section 5 is the engine that drives the act and renders it enforceable as a practical matter, section 2 is still the basic protection against discriminatory practices. Preclearance does not cover all areas and may not resolve every threatened violation where it does apply. Preclearance is designed to stop voting discrimination before it can start in covered jurisdictions, and section 2 is calculated to end it whenever and wherever it is found.

The change in section 2 proposed by the House bill and embodied in S. 1992 is a sensible one in light of the history of the Voting Rights Act. It is regrettable that the Constitution Subcommittee did not see fit to retain the change. It provides that a practice which results in a denial or abridgement of voting rights is prohibited. The reason for this amendment is not to tighten the law but to respond to the Supreme Court's *Mobile* v. *Bolden* decision, which is the first Supreme Court case to read a requirement of intent into the application of section 2.

I am all too familiar with the ambiguities of the word intent. I am a former prosecutor in Vermont. I have operated under typical criminal statutes, where the element of intent is usually crucial to the outcome of a prosecution. I was glad to work under a system of law where innocence was ardently presumed and where proof of intent protected individual rights by barring casual prosecutions. But I am convinced that the *Bolden* intent test is not needed to protect the rights of governments, and if applied in section 2 cases will render section 2 unenforceable.

Intent is hard enough to prove as applied to a natural person, because the pattern of individual conduct is often an ambiguous guide to the individual's intent. Deriving intent from a person's spoken words is difficult because the words are usually indirect and rarely tell us: "I meant to do it because * * *."

The decision in the remand of *Bolden* by the Federal District Court in Alabama is a painful illustration of how the intent test can turn a search for the truth about the openness of an election system into a battle over ancient municipal records. Though the *Bolden* plaintiffs prevailed in this case, the demands made on them were excessive. Others may not be able to meet them.

Not only the best but perhaps the only proof of discriminatory purpose is discriminatory result. Not disproportionate result, as some have said is the secret agenda of the new section 2, but discriminatory result. It has been hard for plaintiffs to show that at-large elections were discriminatory where dilution of voting strength has been the basis for a section 2 action. In the decade before *Bolden*, the courts had fashioned tough standards of proof, and the small number of cases actually brought to trial since 1965 attests to the fact that the floodgates would not be opened by a return to the jurisprudence that applied before *Bolden*.

The amendment to section 2 will continue to ask, as before, whether a particular election scheme, as a product of its normal operation, isolates racial or language minorities within the political system and denies them access to political power in a practical sense.

It is the opportunity to participate, not the actual use of that right, which is crucial, the opportunity to participate. But, if minorities are denied he opportunity to get to the ballot box, it is no answer to an attempt at correction that the denial is advertent or wedded to events in the dim past. Once a denial is established, and not simply a disproportionate result, it makes no sense to say we will not right the injustice because there is no evidence that anyone planned it that way.

Bolden v. *Mobile* has changed the Voting Rights Act, and I believe that we must change the words of section 2 in order to preserve its meaning. And I hope that in marking up S. 1992 we proceed at full speed and without interruption, for time is short and history is looking on.

I hope we change the words of section 2 in order to preserve its meaning in the same way that the *Mobile* case has changed the Voting Rights Act. I hope that in marking up S. 1992 we proceed at full speed and without interruption. Time is short, Mr. Chairman, and history is looking on. I commend you for your efforts to move this matter forward. I am perfectly willing to be here when needed.

The CHAIRMAN. The 5-minute bell has rung. There is objection to continuing.

When we come back here next week, we hope we will make progress. I would like to get this bill out of this committee by the end of next week.

We will now adjourn until 10 o'clock next Tuesday.

[Whereupon, at 10:55 a.m., the committee was adjourned.]

EXECUTIVE SESSION CONSIDERING VOTING RIGHTS ACT

TUESDAY, MAY 4, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

* * * * * * *

The CHAIRMAN. Now we go into the Voting Rights Act. I wish to make a brief statement.

We will continue today our consideration of the Voting Rights Act Extension Bill of 1982, S. 1992.

It is vitally important that we utilize every available minute so that we can complete work on this important measure as soon as possible. The Senate does not convene until 11:30 today, and with the objection to our meeting beyond 1:30, we have about 3 hours and 10 minutes now left to work. I am hopeful that we can accomplish our business within that time; however, if more time is required, I will reconvene the meeting tonight after the Senate recesses.

I want to be fair to every member's concern. I want every member to have the time to express his views and to discuss this issue fully. However, I have pledged to this committee and to the Senate that we will attempt to finish our work without delay, and I intend to accomplish that goal.

I trust that we will maintain a quorum for the duration and that every member will do his part to insure that we can have complete but expeditious consideration of this bill.

I now recognize the Senator from Utah, Senator Hatch, chairman of the subcommittee.

Senator HATCH. Mr. Chairman, I have nothing further to say until Senator Dole presents his amendment. I would be happy to pass at this time.

The CHAIRMAN. Senator East?

Senator EAST. Mr. Chairman, what is our modus operandi today?

The CHAIRMAN. The subcommittee report was made to the full committee. Senator Hatch is chairman of that subcommittee. So far as parliamentary procedure, that report is before the committee now.

Senator EAST. I was curious. The last time we met, the priority on the agenda was the opening statements by Senators, which I would like to do, at the appropriate time offering my amendments. I am simply inquiring.

The CHAIRMAN. Would you want to make your opening statement now?

Senator **East**. I would like to do so before we get into amendments.

The **Chairman**. Senator East is recognized.

Senator **East**. I have other amendments that I would like to offer at the appropriate time.

The **Chairman**. You will have time, Senator, to offer any amendments you wish. Senator East will now make his opening statement.

Senator **East**. Mr. Chairman, I appreciate the opportunity to address my colleagues on this matter. I have made it clear from the beginning that I, too, have no intention to obstruct or to be dilatory. As Senator Kennedy has pointed out, this is one of the most important pieces of legislation that we will be dealing with on this committee and in the Senate this year. I think it deserves the very best we can give it in terms of discussion and deliberation. That is why I have asked that we conduct business with a quorum. But I will make it clear that I intend to utilize my time fairly and prudently and respectful of the great demands upon the schedules of my colleagues.

I only want again an opportunity to state as concisely as I can my deep concerns about what we are doing in my opening statement and then at the proper time to offer some amendments. I will do that briefly, to allow adequate debate, and I am willing to take the vote, and I am willing to live with the results.

It is my strong feeling, Mr. Chairman, that the direction in which we appear to be moving, if the newspaper reports are accurate, is not a good one. I just want to get on the record as to what my concerns are. Let me try to be as concise as I can and move ahead.

First, Mr. Chairman, I think S. 1992, which is the Kennedy/Mathias House version, is wholly unacceptable for a variety of reasons that can be brought up at the proper time. For those of my colleagues on the Republican side who look upon it as being in the spirit of Abraham Lincoln, I would suggest a parallel more appropriate would be Thaddeus Stevens; not Ted Stevens but Thaddeus. I think it is dogmatic and heavy-handed. The impact that it will have, not only in the South and in the rest of the country, will be very difficult to explain to one's constituents, I suspect, once it goes into operation.

I will reserve comments to see what precise form S. 1992 comes before this committee or whatever the so-called compromise is.

Let me, Mr. Chairman, turn quickly to the 1965 Voting Rights Act, which some are saying we ought simply to extend as it currently is with maybe a modification or two. Here, too, I think we must look at this carefully. I personally have strong and deep reservations about it. Let me put it in perspective, Mr. Chairman. In 1965, when this act was passed by the Senate and the House and signed by the President of the United States at that time, it was understood that this would be a temporary measure. It had certain triggering provisions in it, the 50 percent requirement, the literacy requirement, which I think were ill-founded in the sense it was assumed if those two components were present it meant that there had been discrimination based upon race by utilization of the literacy test.

It is interesting to note that at that time the act had application in Arizona and Alaska, which certainly would undercut any notion that the triggering provisions were anything other than a mechanism, a device to bring a certain region of the country under its control.

Mr. Chairman, in the South and in the affected areas, that is in the nine States and the 13 others, there has been a long and checkered history in terms of the Justice Department's interpretation and application of this act; more of that in due course. It is now 1982. We are looking at this act again for continued extension. The act in 1965 was considered to be temporary in purpose. Certainly, Mr. Chairman, there were reasons for it at that time; they no longer exist. I do not know of anyone who is seriously arguing that the literacy test is being used in the South today to discriminate or to keep someone from voting because of race or color. First of all, there is no literacy test. Registration is high. I would point out that minority registration in the State of Mississippi is greater than it is in the State of Massachusetts.

So, I query whether the original purpose of the act any longer exists.

Mr. Chairman, I would like to make it clear I would happily support any statute that in letter and in spirit reflected the purpose of the 15th amendment. The 15th amendment is the governing constitutional provision here. The purpose of the 15th amendment is to guarantee access to the ballot box in terms of registration and voting and having it count. But I fear, Mr. Chairman, the direction in which we are now moving is one which would force us to guarantee results, concretes, specifics, percentages. Call it what you will, Mr. Chairman.

I suspect that this act will move us in that direction, and there will be no turning back from it.

Mr. Chairman, if I could have order, I would appreciate it.

The CHAIRMAN. Order in the committee. The Senator has a right to be heard, or we will suspend until we have quiet.

Senator EAST. Mr. Chairman, I would like to point out that currently in North Carolina, for example, we have not been able to have elections this entire year. The problem has been that under section 5 of the 1965 Voting Rights Act we are now being subjected to a results or effects test, more precisely proportional representation. If anybody on this committee thinks that what they are about to put through will not involve that, I can assure them it will. It is now being done under section 5 of the 1965 act in the affected areas, in the South, including my State of North Carolina.

Let me quote, Mr. Chairman, as I did the other day, from the Charlotte Observer. This involves effort to construct districts, State senatorial districts for our general assembly. This involves a letter from William Bradford Reynolds to State officials about the progress they are making in constructing those districts. Let me quote from the Charlotte Observer, April 20, 1982: In a letter to State officials, Bradford Reynolds, head of the Civil Rights Division, said attempts to create black majority districts in two cases did not go quite far enough to guarantee blacks could elect a candidate of their choice. "The submitted plans are a substantial improvement over the objected-to plans," said Mr. Reynolds. "On the other hand, each plan continues to have a single objectionable feature."

Listen to this quote, which is quite revealing, and tell me this is not a guaranteed result. This is from Mr. Reynolds, who is making his decision based upon section 5 of the 1965 Voting Rights Act. He says this:

> Our analysis shows that during the Senate redistricting committee's consideration of this district, it was widely recognized that at least a 55-percent black population was neecssary if black voters were to have a reasonable chance of electing a candidate of their choice.

So, he is forcing that district to be redrawn from a black population of 51.7 percent to 55 percent in order to do what? To guarantee the election of black candidates.

Mr. Chairman, I do not know if language means anything today. But, if that is not a guarantee of result and effect, quota, proportional representation, percentages, you call it what you will, Mr. Chairman, or anyone else, but that is precisely the direction in which we are moving.

I would like to quote from my hometown newspaper, a strong Democrat newspaper. Incidentally, I might note that Senator Kennedy's distinguished brother campaigned in Greenville, N.C., in 1960, the only presidential candidate to do so in modern history. This paper, incidentally, was a great supporter of his candidacy. This is what they say about that decision in their April 22 editorial. It says:

> Federal intervention into local and State-level elections was worthwhile. It was intended to make certain that voting laws apply to all persons and that all persons had an equal chance to vote. But the Justice Department is now going beyond that tenet in apparently calling for just the reverse, in this case specific districts in which blacks are guaranteed a seat. This type of discrimination is just the reverse of the discrimination the 1965 Voting Rights Act was intended to erase.

This is from one of the most faithful Democratic Party papers in the State of North Carolina. I am simply saying for the record as clearly as I can that these so-called effects or intent tests are going to move you in the directions of not only requiring this in the South, where we have already been through it, but inviting the rest of the Nation to participate in it.

Mr. Chairman, we are told, of course, there is a disclaimer in all of this. We are being told it will not happen, because the disclaimer says that proportional representation will not be required. Mr. Chairman, as the Attorney General of the United States has pointed out, a disclaimer of this kind either negates the effects test or is meaningless, because there is not anything else left. If you guarantee the right to register and to vote and to have it counted, and that is what the 15th amendment entitles you to do, and any legislation dealing with this subject, that is what it would guarantee you to do, and I have no quarrel with that. But now we are being told there will have to be some sort of results. What else is there? It can only mean percentages, goals, quotas.

I fear, Mr. Chairman, that this language is going to do for the voting process in this country what busing has done for education. It is going to be highly disruptive and, I think, contrary to the intent and sentiments of the great, vast majority of the members of this committee or of the U.S. Senate.

Mr. Chairman, as I wind up this discussion on my deep concern about proportional representation, and that is where you are going; it cannot be anything else; there is not anything else left once you go beyond registering, voting, and having it counted. What else can they mean? They say we do not mean results. Well, what do they mean? What can they mean? They are going to mean exactly what William Bradford Reynolds is saying section 5 means. It means you are going to have to so structure your electoral process in your respective States to guarantee proportional representation.

Regarding this matter of whether proportional representation is a good thing if we choose to go that road, we should do it through constitutional amendment. We cannot do it through the 15th amendment because the 15th amendment does not guarantee that. It guarantees the right to vote, Mr. Chairman, nothing more and nothing less. I will support any reasonable legislation directed to that end.

Let me quote from the father of the Constitution James Madison, in the Federalist No. 35. This is what he said about results, effects, and proportional representation. He said:

> The idea of an actual representation of all classes of the people by persons of each class is altogether visionary. Unless it were expressly provided in the Constitution, which it is not, that each different occupation should send one or more members, the thing never would take place in practice.

He continues:

> It is said to be necessary that all classes of citizens should have some of their own numbers in the representative body in order that their feelings and interests may be better understood and attended to, but we have seen that this will never happen under any arrangement that leaves the votes of the people free.

So says James Madison. Then he concludes:

> It is not natural that a man who is a candidate for the favor of the people and who is dependent on the suffrages on his fellow ciizens for the continuance of his public honors should take care to inform himself of their dispositions and inclinations and should be willing to allow them their proper degree of influence upon his conduct?

This is the great Madisonian model of consensus building in American democracy, that a candidate has to build a broad coalition of diverse groups and interests, racial, sexual, religious. It has never meant in our system as a matter of democratic political theory that any particular entity could be guaranteed a particular result. It could not be done on the basis of sex. It could not be done on the basis of religion. And it ought not be done on the basis of race, however noble the intentions, Mr. Chairman, and however honorable the goal. And I understand the good intentions of all of the gentlemen here.

I would simply inquire, Mr. Chairman, if we are going to move in the direction of guaranteed result, why would we confine it to race? Why would not we include sex? Why would not we include religion? Proportional representation as a matter of democratic political theory was rejected by the framers. The rejection is explained in the Federalist No. 35 by James Madison. He says our Constitution does not provide for it.

I would simply say to this distinguished group if that is what they want then let us open up that whole can of worms. Let us look at all aspects of guaranteed result or representation. But do not do it in a spirit of haste, of "compromise" and do it under great pressure in order to placate some feeling that some way or other this would be a noble thing to do. Again, I do not question the motivations or the intentions. But, as we know, Mr. Chairman, quite frequently good intentions to many places do not work out well.

It appears, Mr. Chairman, the nub of our problem is going to be the ensuing discussion over effects versus intent. It is a very vital point. I would ask each and every member of this committee and of the U.S. Senate to think long and hard about what they are doing in their respective States. Note now that the entire country will be covered by section 2. This means that all States will be affected. It means at-large elections are going to be dead.

I would like to note, Mr. Chairman, that at-large elections came out of the progressive era of history in this country to get away from the ward system, which was looked upon by the reformers in those days as being a corrupt way of forming city government. They went to the at-large election to try to get a broader based representative, one who had a citywide perspective. That was the purpose of the at-large election, an honorable one, a good one. These provisions that we are now being asked to consider will negate that. It will force us back into the old pattern of specific districts. I think it will fragment American politics. It will intensify racial hostility because it means that white candidates will campaign in white districts, black candidates in black districts. There will be no need for a black candidate like Mayor Bradley in California to build a broad constituency. He will simply go into his black constituency. That would be the input of it in terms of abolishing at-large elections. It would mean white candidates would no longer need to be sensitive to the concerns of their black constituents because they would simply be campaigning for white votes. And all of that would be done in the name of enhancing racial harmony and racial participation in the United States.

Mr. Chairman, I cannot in good conscience accept that. Again one might say but the intentions are good; they are honorable; they mean well; they want to enhance a certain form of participation in American politics. I understand that, Mr. Chairman. But the issue involves very important constitutional questions. It involves enormously important problems in terms of what will ultimately be required as far as results, effects, proportional representation, call it what you will.

I intend, Mr. Chairman, to do everything I can to alert my distinguished colleagues as to what they are doing here. I think they ought to reflect long and hard on it.

Finally, Mr. Chairman, I would like to at the proper time offer amendments dealing with the problem of burden of proof, which under the 1965 act is ill-conceived in terms of the burden of proof is still upon the locale; it is not upon the Attorney General. I want to talk about reasonable bailout. I want to talk about this problem of venue.

Mr. Chairman, I would like to make it clear I will bring up all of these matters in an orderly way, not a dilatory way. They deserve to be aired. My colleagues need to reflect upon it, think about it. However they vote, I will respect it. But the thing that has troubled me from the very beginning on this whole business of the Voting Rights Act is some motion we must get it through quickly, never mind the constitutional questions, never mind the implications of it or the application of it; we must get it through, that some way or other it is a taboo subject to discuss publicly. We must get it behind us. We must get on to the budget. We must get on to this, and we must get on to that.

Well, I have no objection about moving the legislative process on in an orderly way. I think we ought to do it with this very important piece of legislation lest we bring this committee or the Senate or the Congress or the democratic process into disrepute by being obstructionist. On the other hand, we have the great obligation as the so-called greatest deliberative body in the world to talk seriously about what we are doing and make sure our colleagues understand what they are doing. If they understand what they are doing and vote for it, that is fine. That is fine and that is the way the system ought to work, and that is the way it does work. I want to see it work that way. But I cannot, Mr. Chairman, for the life of me believe that, if the U.S. Senate and its distinguished Members understood how this section 5 has been applied in the South and how section 2 of the new bill will now be applied nationwide, I do not think they would accept it. I think they would turn it down and say: That isn't what I thought we were doing; that isn't the direction I wanted to go; I don't know where along the way I got confused about what we were doing. And I think that is the great juncture at which we now bring ourselves, Mr. Chairman.

I thank the indulgence of the Chair. I thank the indulgence of my colleagues. I look forward, Mr. Chairman, at the appropriate time to deal with whatever particular piece of legislation is brought before this committee and offering the appropriate amendments. Thank you, Mr. Chairman.

The CHAIRMAN. Does anyone else have an opening statement? The Senator from Alabama.

Senator DENTON. Mr. Chairman, I want to compliment you for the nobility of your motivations in bringing this unclear and somewhat controversial legislation before this committee and trying to get it to the floor expeditiously. I have a longer statement which I will defer.

I want to recognize the outstanding and dedicated efforts of Senator Hatch. I think it is worth noting that, although his State of Utah has no jurisdiction, not one, covered under this act, yet my chairman on Labor and Human Resources has worked hard to present all aspects of this important issue. It adds to my reasons for admiring him. I want to thank him personally. I know that my colleagues on the committee appreciate his accomplishments in shepherding this legislation through the committee in a timely fashion.

I also want to recognize the efforts of Senator Dole. There is no one whose idealism and pragmatism together enjoy more respect from me. I know that he has worked tirelessly to find common ground for those of us with differing views on the effect-versus-intent question in section 2 and on the length of the extension of the preclearance provisions of the act. Senator Dole and others on the committee, including Senator Mathias, Senator Heflin, Senator Kennedy, have created a new framework within which we can begin our consideration from a new position on the Voting Rights Act. Theirs is a valuable contribution and one that I sincerely appreciate.

Because the question is so important, I will withhold my judgment on the merits of the amendment proposed by Senator Dole until the committee has thoroughly discussed its potential effects. I must note that any amendment we find to be an acceptable compromise still must be approved by the Senate and withstand the rigors of a conference with the House, where we must keep in mind that the version therefrom contains a strict results test in section 2 which all of us have overtly declared our disapproval of or implicitly declared it, and that that version does not contain even a cap on preclearance or bailout review of the sort provided by the Dole amendment.

I hope we will examine and consider these and other proposed changes with the unmost care.

Some provisions of the Dole amendment, as I understand it at the moment, do trouble me. I want to go on record as one who is and has been all his life in favor equality of opportunity for all citizens. I am for the valid goals that I am sure Senator Dole has in mind with respect to his version of this. I believe the South has suffered through racial tension. I believe the War Between the States was a result of the south having inherited an absolutely abhorrent institution, that of slavery.

I believe that there has been in the past an inherited discriminatory feeling resulting from Reconstruction, not prejudice. But the farther you got from Washington, D.C., the less you felt of President Lincoln's worthy remark when the victory parade was passing by him and they asked him what song he would like to hear the band play, he said: "Let the band play Dixie." That spirit was felt throughout Virginia. It did not reach Mobile, Ala. In Mobile, Ala., there were some pretty darned harsh and uncompromising and unforgiving practices which took place which resulted in my grandmother, for example, having hatred in her heart not because she disliked blacks but because she disliked what was done when her blacks were freed before the Emancipation Proclamation. They stayed with her for two generations after that, loved her and her mother, and so on. Now, the Senators from the North ought to know about things like that. They ought to know that we have not all been antiblack in the South, nor are we now. There is less trouble in Selma, Ala., right now, and we have come through a night. I believe the dawn is here. I believe the South is aware that there is further progress to be made on the part of all of their citizens. But the majority of whites in the South, I think, are at least as well disposed toward their black brethren as those in the North.

I think there is less trouble in Selma than there is in South Boston. I think that Chicago, last night being portrayed on television as the most segregated city in the United States, is something that gnaws at the heart of some of us from Southern States, where my mother now lives in a black and white neighborhood, which 20 or 30 years ago would have been considered impossible and repulsive. She is perfectly happy there now. Some of her dearest friends and closest associates are black, as are mine. Not one black person who ever heard me talk during my campaign voted against me, but the majority of the blacks in the State did because they were told by their black bosses: Vote against him; he's a Republican; he's a conservative; he doesn't like blacks.

In my State I know that 62.2 percent of the blacks are registered voters. In Massachusetts 43.6 percent are. Why is not Massachusetts covered by section 5 and Alabama is? I think there should be some candid reappraisal of facts like that.

There is emotion about this because people do not like to be looked down upon when they indeed feel that they should not be. Thank you, Mr. Chairman.

I ask that the full statement I had prepared be included in the record of these proceedings.

The CHAIRMAN. Without objection, it is so ordered.

[Material referred to follows:]

PREPARED STATEMENT OF SENATOR JEREMIAH DENTON

Mr. Chairman, the Voting Rights Act and other civil rights laws have been an important part of this country's commitment to protecting the fundamental rights of all Americans. The civil rights struggle that produced the Voting Rights Act also left a legacy of freedom and equality which is unparalleled in the history of nations. I know that Alabama is a better place because of the civil rights movement, but that much more remains to be done before the vestiges of racial prejudice are totally eradicated, in my State and others.

As a boy, I saw the consequences of racial prejudice and can still vividly recall scuffling with some of my classmates who would throw stones at the black women who stood at bus stops. Those were sad and tragic days. I am pleased to know that I can participate in this year's consideration of extension of certain provisions of the Voting Rights Act. Clearly, the right to register and to vote is one of the fundamental requisites for citizenship in a Democracy. The denial of that right as practiced in the South and elsewhere before the enactment of the Voting Rights Act in 1965 was inexcusable and morally reprehensible.

Today, however, the Judiciary Committee faces a different world than that existing in 1965. Tremendous advances have been made in assuring the right to vote for members of minority groups. There has been a shift in both attitude and actions by local officials and by ordinary citizens. The dramatic increase in black voter registration and turnout in the South in the last seventeen years is evidence of the success of the Act.

I hope that members of the Committee from states that do not have jurisdictions "covered" by the preclearance provisions of the Act will consider carefully the consequences of adopting the House version of this year's extension. Many states and jurisdictions are growing increasingly dissatisfied as they come to understand that their good-faith, and largely successful, efforts to end voter discrimination are not to be recognized by the establishment of a reasonable bailout provision.

Moreover, responsible leaders at the the state and local level are voicing opposition to the establishment of a "results" or "effects" standard, in Section 2 which would transform the Act. The amended Section 2 would institute in this country a system of proportional representation, and proportional not by political party but by racial and ethnic classification. I cannot imagine anything more inimical to the ideals on which this country was founded, or to the philosophy and ethic which has prevailed since its founding. Under the amended Section 2, any election outcome that produced results out of line with ethnic and racial proportions would be suspect, and perhaps overturned, if, at the same time, any one of a number of "objective" factors of discrimination was present.

Interestingly, the central case in the debate over retention of the current "intent test" is the 1980 Supreme Court decision in *Mobile* v. *Bolden*. The High Court in that case upheld that the "intent test" was the standard under Section 2. Supporters of the House bill have argued that *Mobile* must be overturned and an "effects test" established because "intent" is impossible to prove. Just last week, on remand to the district court, requirements of the "intent" test were satisfied when the plaintiffs were able to demonstrate to the court's satisfaction the discriminatory intent of *Mobile's* at-large election method. The *Mobile* case should, therefore, lay to rest the argument for the establishment, under Section 2, of an "effects test" that could be used to attack all at-large elections and establish racially "safe" districts.

Early on during the consideration of the bill now before us, I was impressed by the extent to which the "exceptional circumstances" that justified this legislation had changed, the Committee's Report highlights this shift by pointing out that minority voter registration rates "in such covered states as Alabama, Louisiana, Mississippi, and South Carolina exceed the average national minority registration rate." The report also suggests, in light of the Court's holding in *South Carolina* v. *Katzenbach* that the proposed "in perpetuity" extension of the pre-clearance obligations in Section 5 may well be unconstitutional. It appears to me that the Subcommittee is correct to question whether Congress has the authority to enact legislation requiring permanent pre-clearance only for a limited number of jurisdictions.

Moreover, from a simple policy point of view, it is objectionable to argue that a state like Alabama, with a 62.2 percent rate of black registration, should be covered by Section 5 while a state like Massachusetts with a 43.6 percent rate of black registration, should not be. This same question applies when one examines the number of black elected officials in covered states. In 1979, with 208 elected officials, Alabama ranked tenth in the Nation in terms of electing black individuals to public office.

Many have argued that the preclearance requirements of Section 5, if they are to be continued at all, should be extended nationwide in order to emphasize the importance of protecting voting rights in every jurisdiction where they are threatened or denied. It is, however painfully apparent that the pre-clearance procedure is intrusive and burdensome. Perhaps the Justice Department's staff could be expanded to meet the administrative demands but I am now convinced that nationwide pre-clearance would simply multiply the problems that limited pre-clearance already has created.

Although Congresss originally designed the Section 5 process as a way to provide covered jurisdictions with a "rapid method" for preclearing electoral changes, it is not functioning in that manner. In *Allen* v. *Board of Elections*, the Supreme Court expanded the scope of the Act by holding that the Act's preclearance provisions were applicable not only to new laws which might tend to deny blacks their right to register and vote, but to "any state enactment which altered the election law of a covered state *in even a minor way*." The volume of submissions required from states, counties, cities, towns, and even organizations, such as school boards which have no responsibility whatever for voting, has reached excessive proportions. The intrusive burdens created by the Section 5 pre-clearance procedure are illustrated by Justice Department statistics indicating that, although it is receiving four submissions (some with multiple changes) per day, the objection rate for Section 5 submissions is currently only 0.2%.

Clearly, the pre-clearance procedure has evolved into a mere inventory of voter registration systems. As stated in a dissenting opinion by Chief Justice Burger, in *U.S. v. Board of Commissioners*, "it is a trivial, though burdensome, administrative provision" for both the covered jurisdictions and the Attorney General. The function of Section 5 as a purported remedy goes far beyond the scope of the arguable violations ascertained. When the onerous burden of compliance is weighed against the small percentage of actual objections, the procedure as now constituted is even less supportable.

Perhaps worse, the administrative pre-clearance process is actually not a process at all, but rather an administrative imposition of the will of the Attorney General, or his staff, there is no provision for a hearing and there are no written standards of review; the confidential file is unavailable to the submitting jurisdictions; and there is no requirement for findings of fact. Indeed, there is not even a necessity to reach the conclusion that a change is discriminatory. As Justices White, Powell and Rehnquist observed, in dissent, in *Georgia* v. *United States:*

> Why should the State be forced to shoulder the burden where its proposed changes are so colorless that the country's highest legal officer professes his inability to make up his mind as to its legality?

Notwithstanding the breadth of the power of the Attorney General, his discretion is not subject to judicial review. It is difficult to imagine a process that is more offensive to the principles of federalism than one that determines the efficacy of a State's laws without either basic due process protections or judicial supervision.

For these reasons, I would support amending Section 5 of the Voting Rights Act to create a more reasonable pre-clearance procedure.

Finally, I agree with President Reagan's statement on November 6, 1981, that "As a matter of fairness, I believe that States and localities which have respected the right to vote and have fully complied with the Act should be afforded an opportunity to "bail out" from the special provisions of the Act. Toward that end, I will support amendments which incorporate reasonable "bail out" provisions for states and other political subdivisions. Under the current provisions of the Voting Rights Act, August 6, 1982, is the date on which covered jurisdictions such as Alabama would have the first real opportunity in seventeen years to achieve "bail out" from the Section 5 pre-clearance provisions.

The Kennedy-Mathias Bill includes so many overly stringent and artificial obstacles to "bail out" that, for practical purposes, Alabama would be denied "bail out" forever. I will vote against the Kennedy-Mathias Bill since I believe it is unfair to deny Alabama and other covered jurisdictions a reasonable opportunity to "bail out" and thereby regain equal sovereign status within the federal system.

In conclusion, I will say only that I do not support these changes in the law as part of an attempt to undo the good that has been done in the last seventeen years. Rather I maintain that the protection of the rights of minority group members is foremost in my mind, because racial prejudice and discrimination are abhorent to me both politically and personally. If we allow the Voting Rights Act to become an insurmountable and inflexible barrier to local and state responsibility, then I believe we will have frustrated the intent of its authors and the Congress that enacted it.

The CHAIRMAN. Does anyone else have a statement to make? The Senator from Kansas.

Senator DOLE. Mr. Chairman, I have a statement that I would make in connection with the amendment I intend to offer, but I want to proceed in any way the chairman wishes. If amendments are in order, then I would be happy to——

The CHAIRMAN. If all the Senators have made statements who care to, I think we ought to proceed with amendments so we can expedite the bill. I want to tell Senator East and others we are not rushing this bill. We are going to give a chance to everybody to make a statement, offer amendments, and we want to proceed in an orderly manner; but we do not want to have delay. I just wanted to explain that position to everyone. We are going to be fair to everyone. The Senator from Kansas.

Senator DOLE. Thank you, Mr. Chairman. Again, I want to express my thanks to the chairman for his patience and for his willingness to meet with us a number of times, a couple of times on Friday, in helping us take, as the Senator said, a step in the right direction. Maybe it does not go as far as some would like. Maybe it goes a bit further than others would like. But it is an honest effort to try to compromise differences in a very controversial and emotional subject, and that is voting rights for Americans.

I certainly have the highest regard for all of my colleagues on this committee. I certainly appreciate the statements by Senator Denton and Senator East. I would hope that when the proposed compromise is fully explained, as it will be, that we might have the unanimous support of every member of this committee; if not on the amendment, then on reporting the bill for Senate action.

Based on that, I would just like to go back and review to some extent what has happened. This bill has been around for some time. The House bill passed the House by a vote of 389 to 24. Now, some would say, well, maybe there would be more votes against it; but it was so one-sided that everybody except for 24 Members decided to vote for it. The next step was introduction of that House bill by Senators Kennedy and Mathias with, I think, at that time 61 cosponsors, now it is about 66 cosponsors; 26 of those are Republicans, and 40 are Democrats. So, it is a strong bipartisan effort and a demonstration of broad bipartisan support for the House bill. I say this as a matter of background to let members know that I assume without any change the House bill would have passed. There were some who were keeping score saying that on this committee there were nine who supported the House version, seven who opposed it, and two who were undecided. Now, the Senator from Kansas was not a cosponsor of the House bill. I had not had an opportunity to look at it. We were very busily engaged in budget and tax matters. It seemed to me that I had some reservations that I thought I should take some time to reflect on and did not cosponsor that legislation. But I do believe that over the years my record on civil rights is a good record. I have some credibility with people in the Senate and this committee and with civil rights leaders who were pushing for the House bill.

In the course of discussing this bill—and I know that the Senator from Utah spent countless hours in hearings, as did other members of this committee, and I commend them for that; and I know of the strong views they hold with reference to intent and results. I do not, say, quarrel with that, but I will try to explain in a minute why I believe that we should move quickly on what I will offer as a compromise for myself, the Senator from Arizona, Senator DeConcini; the Senator from Iowa, Senator Grassley. And then the original sponsors of the major provision have joined in the compromises, Senators Kennedy and Mathias, along with, I think, Senator Metzenbaum, who has an important provision in that bill.

I would like to include in the record before I give my statement a statement by the President supporting the compromise because I think it indicates the President's commitment in this area. I would only say that he indicates in the last paragraph:

> The all-important goal now is to enact an extension of the law as quickly as possible so that we can put it into effect and assure all of our citizens that we are committed to protecting their most sacred rights. As I said in my statement of November 6, the right to vote is the crown jewel of American liberties, and we will not see its luster diminished.

I would say to some who were urging the White House to make such a statement that it came within 1 hour after the press conference yesterday. The Senator from Kansas, I guess it is fair to say, knew it was coming but was not in a position to announce it at the press conference. In any event, that is an indication of the President's commitment and, I think, indicates widespread support.

I can also indicate that other Senators who did not cosponsor the legislation, such as Senator Goldwater and Senator Gorton and others, have now indicated their support for the compromise and, I believe, will be doing so publicly before the day is out. That will be a fair number of Senators on the Republican side. I understand there may be some on the Democratic side who will express their support for the compromise.

I would say at the outset that supporting the compromise does not indicate that everybody is totally satisfied with the final product. There are some who have reservations that we do not do enough, as I said earlier, and some will probably—and I certainly respect that right—attempt to amend the compromise in the committee and on the Senate floor.

As the members of the committee are aware, late yesterday afternoon I along with Senators DeConcini, Grassley, Kennedy, and Metzenbaum and Senator Mathias, who could not be there, announced that we had worked out a compromise on the matter now under consideration. The compromise is the result of extensive negotiation and discussion with our colleagues on the committee as well as with leaders in the civil rights community. I believe that, as I try to count the present support for the compromise, there are about 13 members of this committee who will support the compromise. Hopefully, that number will grow before a vote is taken.

In addition, as I have indicated, the compromise has received the endorsement of the President. The President, I think it is fair to say, does recognize that there are some concerns before the committee with reference to bailout provision. But generally it is a strong endorsement of the proposal.

Before getting into the specifics, I would like to share a few general comments about the Voting Rights Act. I would certainly like to add my name to everybody else in this committee regardless of their view on the compromise who have acclaimed the act as the most effective piece of civil rights legislation ever passed by Congress. In the past, I have supported measures designed to extend and strengthen this legislation. I hope that I can be of some help in this Coongress.

In addition, I think it is important, and I share everyone's concern that we should not rush the legislation; but there are a number of matters that must be dealt with between now and the first of June: for example, the debt ceiling for example, the defense authorization bill that is on the floor; the budget resolution. There are a couple of opportunities, notwithstanding that rather heavy schedule, where the Senate might consider this legislation. It is also my understanding, I would say to Senator Denton, that I entered into this compromise on the firm assurance that the House would accept the compromise, that we would not go to conference and have it watered down. If that happens, the Senator from Kansas is going to have some serious reservations, as I had about section 2 of the House-passed bill.

I hope it is fair to say that there has been contact with leaders in the House. It is my understanding, unless there are amendments adopted that could not be acceptable, that at least the language of the compromise would be accepted by the House and might even avoid the necessity of a conference altogether. I think that is a matter that ought to be fully understood.

In August key protections of the act will expire. That is another reason, I think, that we should use deliberate speed where we can. There is a clear mandate from the American people; there is no doubt about that. I think that is another reason we should act promptly.

With regard to the compromise itself, we are all aware that the most controversial aspect of the committee's consideration of S. 1992 relates to section 2 of the Voting Rights Act. Section 2 lies at the heart of the act insofar as it contains the basic guarantee that the voting rights of our citizens should not be denied or abridged on account of race, color, or membership in a language minority. In the 1980 case of *Mobile* v. *Bolden*, the Supreme Court interpreted section 2 as prohibiting only intentional discrimination. The Mathias/Kennedy bill would amend section 2 to prohibit any voting practice discriminatory in result. The bill recommended by the Constitution Subcommittee, however, would not amend section 2, thus leaving the intent requirement of the *Mobile* decision intact.

Proponents of the results standard in the Mathias/Kennedy bill persuasively argue that intentional discrimination is too difficult to prove to make enforcement of the law effective. Perhaps more importantly, they have asked, if the right to exercise a franchise has been denied or abridged, why should plaintiffs have to prove that the deprivation of this fundamental right was intentional. On the other hand, many on the committee have expressed legitimate concerns that a results standard could be interpreted by the courts to mandate proportional representation. That is the matter that Senator East referred to and, I think, properly so. However, it has been repeatedly pointed out that prior to *Mobile* the courts used a legal standard which did not require proof of discriminatory intent and that the use of the legal standard did not lead to court-ordered proportional representation.

The supporters of this compromise believe that a voting practice or procedure which is discriminatory in result should not be allowed to stand, regardless of whether there exists a discriminatory purpose or intent. For this reason, the compromise retains the results standards of the Mathias/Kennedy bill. However, we also feel that the legislation should be strengthened with additional language delineating what legal standard should apply under the results test and clarifying that it is not a mandate for proportional representation. Thus, our compromise adds a new subsection to section 2, which codified language from the 1973 Supreme Court decision of *White* v. *Regester*. *White* was a controlling precedent for voting rights cases prior to the controversial *Mobile* decision.

The new subsection clarifies, as did *White* and previous cases, that the issue to be decided is whether members of a protected class enjoy equal access. I think that is the thrust of our compromise: equal access, whether it is open; equal access to the political process; not whether they have achieved proportional election results.

The new subsection also provides, as did this *White* line of cases, that the extent to which minorities have been elected to office is one circumstance which may be considered. But it explicitly states—let me make that very clear—in the compromise that nothing in this section establishes a right to proportional representation.

Another issue which has been the focus of debate in the committee concerns a preclearance requirement of the Voting Rights Act. Pursuant to section 5 of the existing law, certain States and political subdivisions with a history of discrimination are required to preclear voting changes with the Department of Justice or Federal District Court in the District of Columbia. In August of this year, many of these jurisdictions will be eligible to bail out of this preclearance requirement. There is virtually unanimous agreement among the committee that the preclearance requirement of the act should be extended. There has been, however, considerable disagreement as to how this should be done.

Under the Mathias/Kennedy bill, jurisdictions could begin bailing out of the preclearance requirement in 1984, but to do so they would have to meet new tough bailout criteria. Under the subcommittee bill, jurisdictions could not begin bailing out until 1992. But in 1992 they would only have to meet the bailout criteria of the existing law, which is simply that they have not used a test or device to discriminate since 1965. That is a rather major difference in the two approaches.

We believe that the approach in the Mathias/Kennedy bill on this issue is preference to that of the subcommittee. I might say that this was a matter that was discussed in great detail on the House side. An amendment there was put together by Congressman Sensenbrenner and Congressman Fish of New York. That was accepted as a compromise in this particular area. Further, under this approach the basic measure of eligibility for bailout is a jurisdiction's good behavior, while under the subcommittee bill it is essentially a mere expiration date.

For these reasons, the compromise retains a new bailout criteria of the Mathias/Kennedy bill but with one significant change. Under the Mathias/Kennedy bill the compromise places a 25-year cap on the preclearance requirement. After that time, the Congress would have to review the progress made in those jurisdictions, if any, which were still subject to preclearance and to enact further extension if necessary. The compromise also requires the Congress to reconsider after 15 years the workings of the new bailout criteria. Of course, as everyone understands, the Congress would not have to wait 15 years. They could review it next year or the year after or every 2 years. But we do put in the statute or in the compromise a mandatory review within 15 years.

This mandatory reconsideration clause will enable the Congress to monitor the progress of covered jurisdictions in establishing a clean record under the new criteria and insure that the criteria continues to work in a fair and effective manner.

Our proposal also includes an extension of the bilingual assistance requirements of the act until 1992. That was also in the subcommittee bill reported out of Senator Grassley's subcommittee. Identical provisions are contained in the House and subcommittee bill.

Finally, it includes a provision of interest to Senator Metzenbaum, requiring that the blind, disabled, or illiterate be able to have an assistant of their own choosing in the polling booth. As I have indicated, this is a primary result of Senator Metzenbaum and others who support that provision, as does this Senator.

I certainly want to commend Senators DeConcini and Grassley in working out the provisions of this compromise, also Senator Simpson, who was an early supporter of the compromise. Obviously, we owe much to the cooperative spirit of the principal sponsors of the legislation: Senators Mathias and Kennedy and, I believe, to the Leadership Conference, and to those who have been actively engaged in the discussions over the past several days.

I believe the compromise strengthens the House-passed bill. I believe that, had it not strengthened the House-passed bill, we could have had a long discussion in this committee. But I do believe that many of the concerns that have been expressed by Senator Hatch and others, and I again recognize their expertise in this matter, much greater than the expertise of this Senator, particularly since they were parties to nearly all the hearings and in the subcommittee markup. Notwithstanding a difference of opinion, I would hope that we would move to adopt the compromise amendment, which in itself would be open to amendment.

I would just say in summary that, so everybody clearly understands, the compromise maintains the results standard of the House bill but adds language—and this is the key part that I think Senator Thurmond and others are concerned about—to address the proportional representation issue. Specifically, the compromise provides that the issue to be decided is whether political processes are equally open, thus placing focus on access to the process, not election results. To the extent which minorities have been elected is one circumstance to be considered. We talk about the totality of circumstances, the *White* v. *Regester* criteria. But it also expressly states that there is no right, there is no right to proportional representation.

Regarding section 5, the compromise retains the provision of the House bill, whereby a jurisdiction can bail out of section 5's preclearance requirement in 1984 by meeting a set of tough, new bailout criteria. But the compromise places a 25-year cap on the preclearance requirement and provides for mandatory congressional reconsideration after 15 years. As I have indicated, there are other provisions of that bill.

I would like now, if I might, Mr. Chairman, to yield to the distinguished Senator from Iowa, who I believe has a statement with reference to the compromise.

The CHAIRMAN. Senator Grassley?

Senator GRASSLEY. Thank you, Senator Dole.

I want to compliment everybody who has been involved with working out this compromise, people on the commmittee staff as well as those outside of the Congress who are interested in this legislation. Yesterday I announced my cosponsorship of this voting rights compromise proposal. As a member of the Subcommittee on the Constitution, I had an opportunity to actively participate in the hearings of the proposed extension of certain parts of the Voting Rights Act of 1965. In those hearings I heard many convincing arguments both pro and con as to the merits of amending this important act, especially of amending section 2.

Throughout these proceedings, I have continuously asked: Is there some middle ground? I sought the counsel of various members of the Judiciary Committee on both sides of the aisle in an attempt to find some point of reconciliation on this sensitive issue. At the subcommittee markup, I expressed my regret at not having attained a compromise position at that time. I made it clear, however, that I would continue to seek a proposal which would gain the support of the vast majority of members of this committee. I believe that this proposal is in keeping with my intentions to resolve this critical issue with a broad, bipartisan measure. I should hope that this bipartisan action would dispel the fears of our minority citizens as to the perceived extension of the Voting Rights Act.

This compromise proposal should put to rest the misrepresentation that the right to vote is threatened because the Voting Rights Act is about to run out. This action is a clear signal that Congress will not allow even the special temporary provisions of the permanent Voting Rights Act to expire. I believe that this compromise proposal is in the best interest of all of our citizens. At a time when we face demanding economic challenges, this Nation needs to unite and not be divisive.

It is apparent to me that the Congress should settle the technical questions involved in this important civil rights matter so that we may focus our full attention in the summer months on the economic challenges which face this Nation. It is in this spirit that I support this compromise which guarantees that all Americans shall have the right to participate in the electoral process.

The CHAIRMAN. Senator Dole?

Senator Dole. Mr. Chairman, if I can now yield to Senator DeConcini, and then we could submit the amendment, there may be others who would like to speak for or against.

The Chairman. Senator DeConcini?

Senator DeConcini. Mr. Chairman, thank you. Thank you, Senator Dole and Senator Grassley. I have already put in remarks on the tremendous work that the chairman of the subcommittee has put forth in this effort. Indeed, it has been a grueling effort to get this legislation before the committee. I think Senator Hatch has the thanks of all of us here as well as the chairman for his dedication to bring this legislation before the committee and the Senate very expeditiously.

During the subcommittee hearings on S. 1992, many Senators expressed concern over the potential consequence of the bill's proposed results test such as racial proportional representation and per se invalidation of at-large election systems. The response which I had and the other cosponsors of this bill gave was that the results test did no more than to reinstate *White* v. *Regester's* standard for vote dilution cases, a standard which had been in use up until the 1980 Supreme Court case, *City of Mobile* v. *Bolden*.

Many Senators, including the Senator from Kansas, Senator Dole, and the Senator from Iowa, Senator Grassley, agreed that the reinstitution of the *White* standard was the proper goal but were uncomfortable with the language of S. 1992. As a result, we worked out an agreement which affirmatively states the standard in vote dilution cases would be with language taken almost word for word from the *White* decision. We made some additional minor changes such as the 25-year limit on the preclearance requirement of section 5 of the act and a provision to insure that blind, handicapped, and illiterate voters can receive assistance from persons of their choice in the voting booth so that such individuals will not be subject to undue influence or harassment from voting officials. Indeed, Senator Metzenbaum, the Senator from Ohio, certainly articulated this cause with great eloquence.

While I have never believed that the original language of S. 1992 would lead to the dire consequences which have been predicted by some of the bill's opponents, I believe that the agreement which we are presented with today represents an improvement in the legislation and marks an important point in the progress of S. 1992 through the Congress. The amendment will preclude speculation concerning proportional representation requirements or impossible bailout requirements. Both of these matters are of deep concern to me. My own State of Arizona is covered under section 5 of the Voting Rights Act and is thus subject to the bailout requirements of the act. Similarly, the largest city in my State, Phoenix, has an at-large election system.

I would never support this bill if I thought that it would make any State bailout from preclearance impossible or if I believed that it would result in an automatic invalidation of the electoral system of the Phoenix city government.

I have studied this legislation very closely. I have worked hard to help put together the agreement today. I am convinced that none of these consequences would occur under our agreed language. I can thus support the agreement without reservation.

I want to add that I am pleased that the administration now agrees that the results test is the proper test and that the Senator from Kansas has forged the amendment which satisfies the administration's position and concerns about proportional representation and at-large election. This agreement is the result of hard work by reasonable people. In addition to Senators Grassley and Dole, Senator Mathias and Senator Kennedy and others who have worked on S. 1992 deserve the credit of finding a middle position here that will insure the results test but will also insure that the intent of the Voting Rights Act is carried out and will not mandate proportional representation.

I compliment the Senator from Kansas and thank him for his diligence and the courtesies he extended to myself and my staff.

The CHAIRMAN. Senator Metzenbaum?

Senator METZENBAUM. Mr. Chairman, very briefly, I would just like to commend Senator Dole and those who worked with him in putting together this compromise. I think it was a superb job. I think it was done under very difficult circumstances. I think that he indeed is entitled to all the credit that one could possibly give to a Member of the Senate. Senators DeConcini, Grassley, Kennedy, and Mathias have also provided superb cooperation in bringing about this end result. The fact that the Leadership Conference on Civil Rights saw fit to accept the amendment is, to me, a credit to the legislative process working its highest and best.

I am personally grateful to all of them for including the amendment that I had offered in connection with the blind, the disabled, and the illiterate. I am most pleased that that amendment is included in the compromise.

I would like at this time, Mr. Chairman, to include in the record a letter from Mr. James Gashel, director of governmental affairs, National Federation of the Blind. I thank you.

The CHAIRMAN. Without objection, it will be inserted into the record.

[Material referred to follows:]

NATIONAL FEDERATION OF THE BLIND,
Baltimore, Md., April 27, 1982.

Hon. HOWARD METZENBAUM,
U.S. Senate, Washington, D.C.

DEAR SENATOR METZENBAUM: This letter is to request your assistance in a matter of concern to thousands of blind citizens of this country. I am speaking of a problem which needs to be addressed in the current Congressional debate over extension of certain provisions of the Voting Rights Act of 1965.

Voting rights are as important to the blind as they are to any other class of citizens. We favor extending the expiring provisions of the Voting Rights Act, but as a class—the blind—this is not a matter of self-interest, inasmuch as the current statute does not include us under its protections. Two factors prompt us to ask for your assistance and consideration. These are (1) the voter assistance problem, and (2) further complicating of this problem by the language of Section 4 of S 1992.

The Voter Assistance Problem: We begin with the premise that people who are blind—including people who see some but not well enough to read ordinary ink print—require some form of assistance in voting, whether the vote is by machine or by means of a paper ballot. According to the most reliable statistics, there are approximately 465,000 blind persons of voting age in the United States. In addition, as many as 1.3 million other citizens have significantly visual limitations to the extent that they may have difficulty marking ballots or using voting machines. In order to participate comfortably and with ease in our electoral process, these voters must be entitled to assistance from other persons.

Historically, most states and political subdivisions have provided for the possibility that some voters will be blind or visually impaired and require assistance. Generally speaking, it became common practice for judges of election or other election officials from each party to assist the blind by reading and marking ballots. This procedure was also designed to protect against the presumed possibility of voter manipulation, which it was felt might take place under the guise of providing assistance to the blind. Thus, upon appearing at a polling place, a blind voter asking for assistance would be accompanied into the booth by the required number of election personnel—each on hand to be sure that the other would not cheat, and all being present for the alleged purpose of protecting the blind voter against manipulation or other fraudulent conduct.

These forms of assistance to and protection of the blind were in use almost universally throughout the United States until the early 1960's. Then, blind citizens began publicly to object to these procedures, branding them as overprotective and even custodial. These objections were the natural outgrowth of a more independent-minded and self-assured approach to blindness arising from within the ranks of the blind, themselves. The result was that several states and political subdivisions chose to change their election laws. The National Federation of the Blind helped to guide these legislative and policy modifications, with the idea that blind voters should be given free choice in designating voting assistants. Also, the Federation argued that the act of voting should be performed privately by each blind person with an assistant. This requirement was designed to avoid intruding upon every blind person's right to cast a secret ballot.

In a very real sense, the custodial procedures which have been used to assist and monitor the blind in voting discriminate by infringing upon the secret ballot right and by discouraging blind persons from voting out of the realistic fear of being intimidated by onlooking election officials. The extent to which this form of voting discrimination exists is emphasized by the diversity of state laws. While it is true that the statutes in most states permit blind voters to have assistance provided by a friend or other person (not necessarily an unknown election official), this mandate is not in place everywhere. Moreover, even where the laws permit blind voters to choose their own assistants, election officials are sometimes allowed to monitor the casting of ballots.

To illustrate this diversity it, should be noted that Ohio has enacted the very acceptable procedure of allowing blind voters the right to choose their own assistants and to vote with assistance in private. On the other hand, at least three states have far more restrictive voter assistance procedures, requiring that a manager of election and a bystander shall assist any blind voter unaccompanied by a spouse. Other states, including, for example Vermont, have statutes which require the blind voter to have an assistant who is a "qualified elector" in the same town. This diversity leads to great confusion among the blind, as well as among election officials, often causing confrontations and disputes over the procedure to be used. The result is that many blind people choose to avoid the issue altogether by staying away from the polls. In other instances, blind people desiring to vote do not do so because their assistants may not meet the specific qualifications of the state's statutes. Thus, we have here a problem of national scope which is properly the subject of the Voting Rights Act of 1965, as amended.

Complicating Effects of Section 4 of S. 1992: Although as presently enacted, the Voting Rights Act does not provide a national standard for the methods to be used when allowing voter assistance (nor does it contain a mandate that such assistance should even be allowed), Section 4 of S. 1992 raises the issue by placing a ban on voter assistance, with an exemption from this prohibition provided for persons who are blind. This is the substance of what would be added to the Voting Rights Act if Section 4 is enacted in its present form, but in our opinion, it is not the complete or proper answer to the voter assistance problem. In fact, it was never intended to be the answer, and the legislative history of this provision in the House makes this clear.

The language now in Section 4 of S. 1992 was not in the original or reported versions of H.R. 3112 but was added as a floor amendment, offered by Representative Millicent Fenwick. The amendment passed on a voice vote. Mrs. Fenwick was concerned that voters not be manipulated under the guise of being assisted by "political bosses." Obviously, she saw this as a proper matter for resolution on a national basis by inclusion of a prohibition on assistance in the Voting Rights Act, and a majority of the House of Representatives agreed. Now, apparently the chief sponsors of the Senate bill, along with the cosponsors of that bill—a majority in the Senate—also agree with the House. So, it would seem that something like the Fenwick Amendment will be enacted into law.

Assuming this scenario, we hope to have the language of the Fenwick Amendment (Section 4 of S. 1992) modified in the Senate and in conference, in order to provide substantively and affirmatively for the right of blind persons and others needing assistance to have such assistance in voting.

The basis for our concern is that enacting Section 4 as is will cause a nationwide reassessment of election policies, including those on voter assistance. All of this will be done in the context of a federal statute which calls for restricting assistance, backed by a legislative history of expressed concern for manipulation of voters. Thus, even where we have already enacted some definite authority for voter assistance for the blind under state laws, the methods and procedures for assistance will be subject to review and likely alteration to conform to a restrictively oriented national policy. Also, our concern is that strange things begin to happen when uninformed election officials are turned loose to follow a general directive such as that contained in Section 4. It is expected, for example, that some will interpret this provision as requiring election officials to protect the blind from unsuspecting manipulation by an assistant in the polling booth. This interpretation would not be far-fetched in view of the purpose of Section 4. Hence, the "protection" of the blind would likely take the form of extreme custodialism. Section 4 thus raises the possibility that election judges will be encouraged to observe blind voters for the ill-conceived purpose of protecting them. There is nothing in this provision to prevent this.

A national standard to insure the right of blind persons and others needing assistance to have the assistance of a person chosen by the voter is required in order to avoid disruption of desirable assistance procedures now in effect, as well as to institute such procedures where they do not now exist. Beyond this general mandate, this amendment would have the value of underscoring the voting rights of blind citizens and others who have visual limitations to the extent that they find it necessary to vote with assistance. It is important for Congress to take this step on behalf of these citizens, since many of them tend to remain away from the polls in fear of having difficulty with the mechanics of casting a ballot. Others are concerned about having their votes witnessed by election authorities, and still others are apprehensive about the possibility of confrontations with election officials when they insist upon naming a personal assistant. This amendment would substantially eliminate the voting problems faced by the blind and alleviate many of the worries about participating in the electoral process which have existed among this population.

We urge the Senate to act favorably on this request for language to protect the voting rights of blind citizens. Voting is a responsibility as well as a right of citizenship; yet, thousands of our citizens who are blind still suffer the indignity of second-class status every time they go to cast their ballots. These are the people who live in jurisdictions which require assistance and supervision by election officials. Such practices deny blind voters the right to cast secret ballots and tell us that public officials do not have faith enough to believe that we, the blind, can competently handle our own affairs without someone, even a friend or a spouse, taking advantage of us. However you seek to justify them, the laws which permit, even require, monitoring of blind voters and our assistants are outmoded, custodial, and not complimentary to the blind as a class of citizens. The Senate should take care not to enact any statute (such as Section 4 as presently written) which might be interpreted as encouraging states to have more restrictively oriented voter assistance policies than they already do.

We pledge to cooperate in any way we can to assist you along these lines, as you participate in marking up the Voting Rights Extension Bill. Fortunately, it would seem that we are not dealing with a controversial matter here; yet, there is always the possibility that unrelated political or parliamentary issues (such as the desire to have a bill identical to that passed by the House) could interfere with objective appraisal and acceptance of our proposal in the Senate. But, we trust and hope this will not be the case, inasmuch as the Senate has the constitutional responsibility to exercise its independent judgment. To the extent that a conference would be required with the House to reconcile this matter, we fully expect that a speedy agreement on this issue could be reached.

Cordially yours,

JAMES GASHEL,
Director of Governmental Affairs,
National Federation of the Blind.

The Chairman. Senator Mathias?

Senator Mathias. Thank you, Mr. Chairman. I think we are all conscious of the fact that this is a measure which is time-sensitive. We have what is known in space science as a window in which to pass this bill. That fact alone makes the contribution that Senator Dole has made even more critical than it would have been under normal circumstances. Senator Kennedy can speak for himself, but I think he and I together as the original sponsors are very appreciative of the work that has been done by Senator Dole, Senator Grassley, Senator Simpson, and Senator DeConcini. It is important.

I am happy to cosponsor the Dole compromise. As a supporter of voting rights legislation since the original bill in 1965, I have never believed that proportional representation was required by the act. The Dole amendment makes that abundantly clear. It seems to me that what our goal has been is a color-free society, a color-blind society and not one that draws precise and definitive and devisive racial lines. That is really what we are reaching for in this amendment. I am gratified that the President of the United States has seen fit to endorse this effort. I think that is an important addition to the whole debate.

I would ask unanimous consent, Mr. Chairman, that a copy of the President's statement of yesterday be included in the record, as Senator Dole has requested.

The Chairman. I have got to open the Senate at 11:30. I am going to ask Senator Mathias if he will take the chair until I come back. After the statements are finished, then we should take a 10-minute recess. I intend to do that anyway before we start the voting if we are through with statements and ready to vote.

Senator Dole. We can keep making statements though, can we not?

The Chairman. Yes. When I come back, I intend to take a 10-minute recess anyway before we start the voting.

Senator Mathias. Senator Kennedy?

Senator Kennedy. Mr. Chairman, I think it is time that we move into the amendments; but I, too, want to express respect for the efforts that have been made by Senator Dole and the other cosponsors of this amendment. I stand as a cosponsor of the amendment as well. I express appreciation to the Leadership Conference. I think Ben Hooks said it well yesterday when he said that, if the Leadership Conference was not interested in the proportional representation, that was not their position, they were challenged to support language which would resolve that concern in the minds of many members of the Senate who were apprehensive about what the courts might do in the future. I think any fair reading of court decisions both in the district court and circuit courts would certainly indicate to any members that that was not a real possibility.

They have supported this compromise. I think this legislation is strong legislation. It is a reaffirmation of this country's fundamental commitment to the citizens of the Nation about participating in the electoral process. I join in commending those who have made now the real possibility of moving in a timely fashion.

I remind our associates and friends that this is not a new issue. Senator Hatch has spent a great deal of time on this issue. Their committee spent a great many hours in the course of hearings. We are now into the late spring. This has been a matter which has been before the committee in one form or another for a number of months. The Attorney General was inquired of on this issue during the course of his own confirmation process.

It is important to point out at this time that the matter has been before the committee for a considerable period of time. Now is the time to act. I welcome the President's support for this proposal. I think it is going to be extremely important in terms of giving the assurance to all of our citizens that this Nation is firmly committed to the full voting rights of all of our citizens.

Senator MATHIAS. Senator Simpson?

Senator SIMPSON. Mr. Chairman, I want to commend Bob Dole for what he has done in this critically important issue.

It has been because of his ability and his persistence and his canniness, I might add, that we have come up with such a fine result. My concern was always with regard to the issue of proportional representation and appropriate bailout language. It is not something that we do not deal with in the State of Wyoming. There are a couple of counties in my State that are involved with this. I have really grappled with it. I appreciate what Senator Grassley has done and Senator DeConcini. I know the great work that Ted Kennedy has done and also you, Mr. Acting Chairman. It has been very helpful to me to see that we were able to so well utilize the language of the *White* v. *Regester* decision, which I think was the most appropriate way to go. I am pleased that it was presented to me by Senator Dole some days ago. I am pleased that I immediately told him of my hearty reception of it. It resolved my quandary for me.

I am very pleased to be associated with it. I wish to be noted as a cosponsor of it. I thank all those who participated in it.

Senator MATHIAS. Senator Biden?

Senator BIDEN. Mr. Chairman, it is getting to be a little bit redundant complimenting our colleagues on this compromise. If you listen to all those who are already there, if it does not pass, I will be shocked.

I cosponsored this compromise. I would like to state the obvious. This does not change much. What it does, it clarifies what everyone intended to be the situation from the outset. That was to rectify a situation that had grown up as a consequence of a Supreme Court case, yet at the same time not thrust into the law a fundamental new requirement that neither the Civil Rights Conference nor the main cosponsors of this amendment ever intended, which was the elimination of at-large election.

As long ago as, I guess, 2 months ago, I met in my office with the members of the Leadership Conference and told them I thought there was going to be a need for a compromise. They were slightly aghast that a supporter of the bill would suggest that at that time. But it was obvious from the outset that it would require in order to allay the fears of many who have an instinct to support this legislation but a genuine fear that it may very well cause fundamental change in the electoral process that was not intended.

It was also obvious that it required some thoughtful leadership from the Republican side of the aisle. I was bold enough back then to suggest that either the Senator from Kansas or the Senator from Nevada would be the likely candidates to lead that charge. I am delighted that the Senator from Kansas did what he always does: Steps into the breach when things are tough and comes up with reasonable approaches to solve very difficult problems. In this case they were, in my humble opinion, less substantive than cosmetic; but that makes no difference in the legislative process. If our colleagues believe in fact they are fundamentally flawed, whether or not that exists, that affects the vote. We need votes. As the former chairman of this committee said, two chairmen back, Senator Eastland: You got to know how to count. And the Senator from Kansas knows how to count. His ability to help us out of this quagmire without doing any injustice to the original intent, in my opinion, of the major sponsors of the legislation, Senators Kennedy and Mathias, is a great contribution.

There is one last comment I would like to make. Senator Grassley and I have had our disagreements on a number of issues. There is probably very little that Senator Grassley and I agree upon except that Delaware is on the East Coast and Iowa is in the middle of the country. Beyond that, I must say quite candidly that I wondered about Senator Grassley's motivation. It is not proper to wonder out loud about the motivation of a colleague, but I did wonder about it. Senator Grassley came to me 6 weeks ago and asked what I thought about the two provisions in controversy here. I, quite frankly, thought it was just a little bit of politics; he just wanted to talk. But I found after a number of conversations that he was deeply interested in seeing to it that the Voting Rights Act was extended.

I must say I have been impressed. I owe him an apology for what I thought at the outset. I did not think he meant it, and he meant it. He obviously meant it by his continued repetition and trying to get me and others on this committee to talk about a compromise. So, I would like to publicly thank him and also the Senator from Kansas, who has slightly more drag with the President of the United States than—well, maybe not, come to think of it. But, nonetheless, you did it, and you are to be complimented. I just hope you are successful on Roth-Kemp taxcut compromises as you were here.

Senator DOLE. I do have a contact in the White House.

Senator BIDEN. Maybe she has some influence. [Laughter.]

Senator MATHIAS. Senator Hatch.

Senator HATCH. Mr. Chairman, I think it is customary to say in these circumstances that I can count votes for the proposed amendment as well as anybody on this committee.

I harbor no illusions, nor have I for many months, about what is likely to transpire today. At the outset, however, I would like to say that whatever happens to the proposed amendment I intend to support favorable reporting of the Voting Rights Act by this committee. Whatever my difficulties with the proposed amendment to section 2, and they are considerable, I have indicated from the start of this debate my strong commitment to the goals and the objectives of the Voting Rights Act. I believe it to be the most important civil rights act in history.

This legislation, in my view, has made an immeasurable contribution toward insuring for all American citizens regardless of race or color the most fundamental constitutional guarantees of the 15th amendment. It has made an immeasurable contribution toward securing for all citizens the most fundamental of civil rights in a free society, the right to participate in the selection of one's elected representatives.

Having said that, I can only repeat what I have consistently stated during the Senate debate on the proposed amendments to section 2. These amendments, in my view, including my friend from Kansas, will effect an incalculable transformation in the purposes and the objectives of the Voting Rights Act. They will alter what has been the traditional focus of the act and indeed of all civil rights law generally from equal access to registration and the ballot to equal results and equal outcome in the electoral process.

The Constitution as well as the public policy implications of this change will be immense. In what seems to be the euphoria generated by the proposed compromise amendment by my friend from Kansas, whom I respect greatly as much as any man in this Senate, I must regrettably state that I believe that the emperor has no clothes. The proposed compromise is not a compromise at all, in my opinion. The impact of the proposed compromise is not likely to be one wit different than the unamended House provision relating to section 2. As much as I have been tempted to embrace this language and, too, of course, claim compromise if not victory, I simply cannot do this.

In this respect, I recall the words of another Member of this body about a decade ago. When asked his solution to the Vietnamese conflict, Senator Aiken of Vermont argued that we ought to immediately withdraw our troops from Indo-China, bring them home, and claim victory for ourselves. That, in my view, if the equivalent of supporters of the intent standard attempting to describe the proposed amendment as a victory or a compromise. As Pyrrhus said many centuries ago, another such victory over the Romans and we are all undone.

I would like to outline for the record very briefly why this language is not a compromise. I would like to do this with full knowledge of just how difficult an issue this has been for many of my colleagues and just how hard they have been looking for language which differed from an intent test and yet differed from the House provision. I do not raise these criticisms of the proposed compromise to call into question the sincerity of any of my colleagues but simply to observe that, to the extent serious questions are raised by the House language, they are not ameliorated at all by the proposed amendment. And I know how sincere my colleagues are.

The proposed amendment contains two sections. The first section is identical to the present House amendment to section 2. It would alter the present law language of section 2 from an intent standard to a results standard. Discriminatory conduct for purpose of the act would be redefined. For all the reasons that have been outlined in my earlier statements and in the subcommittee report, which I would recommend to anyone genuinely trying to understand these issues, the first section is as equally flawed as the House language. The question then is whether or not the second section, which is largely new, would mitigate any of these difficulties. I do not believe that it would whatsoever.

In short, this language amounts to little more than cosmetics.

Let me focus on the highlights of this section. The section refers to violations being established on the basis of totality of circumstances. That, I gather, is supposed to be the helpful language. It is not. There is no doubt that under either the results or the intent test a court would look into the totality of circumstances. The difference is that under the intent standard, unlike the results standard, there is some ultimate core value against which to evaluate this totality. Under the intent standard, the totality of evidence is placed before the court, which must ultimately ask itself whether or not such evidence raises an inference of purposeful discrimination. Under the results test, there is no comparable workable standard.

As Prof. James Blumstein has observed:

> Under the results test once you have aggregated out all those factors, what do you have? Where are you? You know, it is the old thing we do in law school: you balance and you balance, but ultimately how do you balance? What is the core value?

There is no core value under the results test other than election results. There is no core value that can lead anywhere other than proportional representation by race. But we are assured that there is a strong disclaimer against this in the new compromise. That is not quite true. The referred-to language states:

> Nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Most pointedly, perhaps, nothing in this language refers to the availability of proportional representation as a remedy to a section 2 violation. Let us see if proponents of this language are amenable to precluding proportional representation as a remedy. Then maybe we will reach a result that would be what they have claimed in public.

More fundamentally, however, this language, in the words of the Supreme Court in the *Mobile* case, is illusory as a protection against proportional representation. It is illusory because the precise right involved here is not in fact proportional representation but the right to political processes that are "equally open to participation by members of a class of citizens protected by subsection a." The problem, of course, is that this right has largely been defined in terms of proportional representation. In other words, this specific right, one not addressed at all in the disclaimer, is violated where there is a lack of proportional representation plus the existence of what have been called objective factors of discrimination.

Perhaps the most important objective factor of discrimination is the at-large system of municipal government, which some in the civil rights community believe serves as a barrier to minority participation. Under the results test the absence of proportional representation plus the existence of an objective factor such as an at-large system would constitute a violation.

In a highly technical sense, it would not be the lack of proportional representation by itself but the lack of proportional representation combined with the so-called barrier to minority voting such as the at-large system. It would be irrelevant that there was no discriminatory purpose behind the establishment of the at-large system or that there were legitimate nondiscriminatory reasons for its establishment. Among just a few of the other so-called "objective" factors of discrimination—and I put "objective" in quotes—besides an at-large system would be laws canceling registration for failure to vote, residency requirements, special ballot requirements for independent or third-party candidates, staggered terms of office, anti-single-shot voting, evidence of racial bloc voting, a history of English-only ballots, numbered electoral posts, majority vote requirements, et cetera, et cetera, et cetera.

The right established in the new section 2 would not technically be to proportional representation. The right precisely would be a system of State, local, or county government that lacked proportional representation and that was characterized by one or more of these objective factors of discrimination.

As the Supreme Court clearly recognized in *Mobile*, a disclaimer of the sorts in the proposed compromise is meaningless and illusory. The root problem is not with an inadequately strong disclaimer. The root problem is with the results test itself. No disclaimer, however strong—and the immediate disclaimer, I submit, is not very strong, in any event, because of its failure to address proportional representation as a remedy—can overcome the inexorable and inevitable thrust of a results test, indeed of any test uncovering discrimination other than an intent test.

The concept of a results test as one focused upon political processes that are not "equally open to participation" is fine rhetoric but has also been identified by the Supreme Court in *Mobile* for what it is at heart. Justice Stewart in *Mobile* stated in response to a similar description of the results test by Justice Marshall in dissent:

> This dissenting opinion would discard fixed principles of law in favor of a judicial inventiveness that would go far toward making this court a super-legislature.

In short, the concept of a process equally open to participation brings to the fore the second major defect of the results test after its notion of proportional representation. That is that the results test offers absolutely no guidance whatsoever to courts in determining whether or not a section 2 violation has been established. It offers no guidance whatsoever to communities in determining whether or not their electoral policies and procedures are in conformity with law.

What is an equally open political process? How can it be identified in terms other than statistical or results oriented evidence? Under what circumstance is an at-large system a barrier to such an open process? Under what circumstances are periodic registration requirements a barrier to an open process? What would a totally open political process look like?

Not only do I believe that proponents of the results test are unable to answer these questions in anything but the vaguest terms, but no one is able to answer these questions. As Justice Stevens noted in his concurring opinion in *Mobile*:

> The standard cannot condemn every adverse impact on one or more political groups without spawning more dilution litigation that the judiciary can manage.

On the opening day of hearings, I raised three fact situations with my colleagues on the committee. One fact situation related to Boston, Mass.; another to Baltimore, Md.; and another to Cincinnati, Ohio. I asked repeatedly how, given the fact circumstances in these communities, could a mayor or councilman in those communities assure themselves that a section 2 violation could not be established. I have yet to hear an answer that would afford the slightest bit of guidance to these individuals, and that is after days and countless hours of listening to testimony and asking questions.

Each of these communities lacks proportional representation. Each has erected a so-called barrier to minority participation in the form of an at-large system. Each has been characterized by some history of school segregation. There are thousands of other cities across the Nation in precisely these circumstances as well.

I will ask the question once more. How does a community and how does the court know it is right and wrong under the results standard? How do they know enough to be able to comply with the law? How do they know what kind of electoral law or procedure is valid and under what circumstances? What kind of electoral law or procedure is invalid? How do we avoid having the concept of racial discrimination boil down to nothing more than what one witness said? I may not be able to define it, but I know it when I see it.

Mr. Chairman, there are other objections to the proposed amendment. As with the House proposal, it transforms the concept of section 2 from one protecting individual citizens into one protecting racial or color groups.

Second, it even goes beyond the House language in its euphemistic reference to the ability of racial groups to "elect representatives of their choice." In this regard, I note the statement of Georgia State senator Julian Bond in the New York Times yesterday, in which he commented upon the redistricting presently taking place in that State. He said:

> I want this cohesive black community to elect a candidate of their choice. White people see nothing wrong with having a 95 percent white district. Why can't we have a 69 percent black district?

That ultimately is what the so-called right to "elect candidates of one's choice" boils down to: the right to have established, racially homogenous districts to insure some measure of proportional representation.

Finally and perhaps most importantly, the proposed compromise suffers from the flaws of the House language in that it attempts statutorily to overturn the Supreme Court decision in *City of Mobile.* In a nutshell, it is every bit as unconstitutional as the unamended House language. Under our system of government, Congress simply cannot overturn a constitutional decision of the Supreme Court by simple statute. The Supreme Court has held that the 15th amendment requires a demonstration of purposeful discrimination. To the extent that the Voting Rights Act generally and section 2 specifically are predicated upon this amendment, and they are, there is absolutely no authority in Congress to impose greater restrictions on the States.

There is purely and simply no power within Congress to act beyond the boundaries of the 15th amendment as interpreted by the Court. It is unconstitutional, in my view, to overturn *Roe* v. *Wade* by simple law, and it is equally unconstitutional, in my view, to overturn *Mobile* in this manner.

Mr. Chairman, the changes that will be wrought by the change in section 2 will not come overnight. They will not be felt fully this year or next year or the following year. Over a period of years, however, perhaps only over a period of decades, the proposed change in section 2 will have a profound impact upon what this Nation stands for. We can launch all the platitudes that we care to about our concern for civil rights, but let us make no mistake about it. Both the purpose and the clear effect of this statute will be to inject racial considerations into more and more electoral and political decisions that formerly had nothing to do with race. Increasingly, this Nation is going to be content with providing compact and secure political ghettos for minorities and conceding them their 10 percent representation rather than attempting to move them toward the electoral mainstream in this country. Increasingly, the Federal courts of this Nation are going to become even more deeply involved in State and local electoral and political affairs than in the past.

The change, Mr. Chairman, will not be subtle. Because of this legislation and because the results test may soon be established in other areas of the law, we are embarking today upon a major change in direction in civil rights. We are forsaking the great historical goals of equal protection and a color-blind society and establishing new goals in which racial balance and color-consciousness are primary. The change may appear to some of us as somewhat subtle today, but I assure you that its impact will become clearer and clearer as the years pass. Rather than moving in the direction of a single society, we have begun to give legal and constitutional sanction to a restoration of separate but equal.

I hope that my colleagues think long and hard about what we are doing here today, as I know that they have already done. Those of you who share at all my concerns about the results test may look appreciatively upon the out being offered us by the present compromise. I would hope, however, that my colleagues will not delude themselves into believing that it represents anything more than that.

I would just say in conclusion that I personally am glad to have this battle approaching an end. I fought it as hard as I could, in the best manner that I could, feeling as deeply as I do about the Constitution, about its principles. I fought it on the highest intellectual plane that I could. But, clearly, the majority of my colleagues have chosen otherwise. I am the first to acknowledge this fact. So, although I cannot support this amendment, I do intend to vote for the final act because of the principles for which it stands and because of my belief that there still are grievous wrongs in our society perpetrated against minority individuals. I personally believe we must do everything we can to root them out.

I feel very serious about this constitutional issue and have felt obliged to make these arguments so that nobody can say, when these issues face the Supreme Court, that they have not been made. Nobody can say decades from now as we see major changes in our society that people failed to make these arguments at the time when such changes could have been prevented.

With that, I compliment my colleagues on both sides. I congratulate my friends in the civil rights community for the way they fought this battle. I have nothing but the highest respect for them. I have learned to appreciate many of these individuals who have testified before our committee for their sincerity, their drive, and their determination in these matters. I compliment them. I compliment Senator DeConcini and other members of our committee for the hard work that they did in sitting through the testimony and listening and trying to do the best they can and, of course, all of my colleagues here today. I am grateful to have participated in this process.

The Chairman. The Senator from Maryland had asked to be recognized next.

Senator Hatch. Mr. Chairman, I do have some questions for Senator Dole that I would like to make for the record, with his permission, as soon as all statements are through.

The Chairman. The Senator from Maryland?

Senator Mathias. In his statement Senator Hatch said that, although there was disagreement as to what was the best approach, he himself was totally dedicated to the protection of civil rights and the concept of equality under the law in America. I wanted merely to say to him that, as far as I am concerned, he does not have to make such an argument. I never doubted that. We have disagreed very strongly on how you achieve equality under the law, but I certainly have never questioned his sincerity or motivation in any respect.

Senator Hatch. I thank my colleague very much for that.

Senator Mathias. Further, Mr. Chairman, I think perhaps the way this has gone has not with without some value. There was a politician in New York some years ago named Percy Sutton who used to say that he was afraid of short meetings. Percy Sutton would have been very comfortable in this meeting. He would have had nothing to be afraid of. But there is some wisdom in that statement of being afraid of short meetings, that if you move too quickly and without an adequate consideration and really without the kind of adversarial proceeding that we have had here, that all the issues do not get aired. I think that Senator Hatch has guaranteed that that would not happen.

So, in the best spirit of Percy Sutton, he has given us a long meeting.

The Chairman. Senator East?

Senator East. Mr. Chairman, you had promised us a recess, as I recall.

The Chairman. That is right, before we start the voting. We will take a 10-minute recess at that time.

Senator East. I would like to call that due now, if that might be appropriate.

The Chairman. Are there any more statements to be made? The Senator from Vermont?

Senator Leahy. Mr. Chairman, just a point of information. I made my statement the other day. I also commend very much the efforts of Senators Dole, Mathias, and Kennedy and the others who put this together. I will not be making another statement. I just wonder if the Chairman has an idea of when we might be voting on this issue. I think each one of us has made up our minds how we are going to vote. Each one of us has made statements.

The Chairman. I think after we take a recess we probably will start voting on amendments unless somebody wants to talk further.

Senator East. I wanted to offer several second-degree amendments to Senator Dole's amendment.

Senator Dole. And I have not offered mine yet.

Senator East. He has not offered his yet. Again, as I have already indicated, I want to move ahead. I simply would like to have a quorum present and a reasonable amount of time to make my arguments and get response to it. I am happy to move things along. I am trying to help the Senator from Vermont. I did have some second-degree amendments I wish to offer.

The CHAIRMAN. You will have a chance to do it.

Senator EAST. Are we going to proceed after the brief recess?

The CHAIRMAN. As I understand the parliamentary procedure here, if it is agreeable with Senator Hatch and Senator Dole, Senator Hatch's subcommittee report is before the committee now. Now, if Senator Dole moves as a substitute, then we vote on that. Whichever is adopted there will become the instrument through which we will work. Then you would offer any amendments if you see fit to that.

Is that agreeable to you gentlemen?

Senator HATCH. That is agreeable to me.

Senator DOLE. Yes.

Senator HATCH. I would like to ask Senator Dole a few questions before he moves this amendment. Should we do it after the recess?

The CHAIRMAN. We will take a 10-minute recess.

[Whereupon, at 11:55 a.m., the committee stood in recess until 12:08 p.m.]

The CHAIRMAN. The committee will come to order.

We are now ready to proceed. I have hopes we might finish by 1:30. Of course, if we do not get started, it will be delayed.

Senator BAUCUS. Mr. Chairman, I have a statement I would like to have included in the record.

The CHAIRMAN. Without objection, it will be included in the record. Also, a statement of Senator Specter's will be inserted into the record, without objection.

[Material referred to follows:]

PREPARED STATEMENT OF SENATOR MAX BAUCUS

I'm sure that everyone here today shares my firm belief that the right to vote is one of the most precious and fundamental rights possessed by American citizens.

And because the right to vote is so precious and so fundamental, I believe it is Congress' duty to do everything within its power to ensure that all Americans have an equal opportunity to exericse that right.

For this reason, I firmly support the inclusion of the "effects" or "results" test in Section 2 of the Voting Rights Act. Under this standard, attention will be focused, properly I think, on the actual workings of election standards and practices. It will be focused on the practical effect of election procedures on the ability of each person to participate fully, equally, and without fear in the political process.

Unlike some of my colleagues who have spoken earlier on this issue, I do not believe that the "effects" test is constitutionally suspect or that it constitutes an attempt on our part to overrule or even circumvent a decision of the Supreme Court.

It is true that the Supreme Court has held that violations of the 14th and 15th amendments require a showing of international discrimination. However, this holding is not the same as saying that Congress may not even touch upon nonintentional discrimination when it attempts to protect and guarantee equal voting rights.

The 14th and 15th amendments specifically empower Congress to enact whatever legislation is found to be appropriate and necessary to enforce the constitutional protection of the right to vote.

The inclusion of the "results" test in Section 2 will have the effect of prohibition voting and election practices that do in fact discriminate against minorities in whatever form and for whatever reason they may exist. While accidential and incidental discrimination will be illegal under this test, the broadened standard will also serve to ensure that discriminatory practices that are intentional will not slip through the legal cracks merely because it is difficult and sometimes impossible to prove in a courtroom that their enactment was racially motivated.

Such a tightening of the standard to be applied, and the consequent strengthening of the guarantee of equal access and opportunity in the political process, are both necessary and appropriate.

Far from being unconstitutional, I see the adoption of the "effects" test as being the most logical and effective method available for fulfilling the duty imposed on us by the Constitution to safeguard the voting rights of all American citizens.

PREPARED STATEMENT OF SENATOR ARLEN SPECTER

I am honored to be participating in the re-enactment of legislation to protect and secure for members of racial and language minorities their rights to vote and have their votes counted in full as participants in this political democracy. In addition, I look forward to amending the Voting Rights Act to provide long overdue assistance to disabled and illiterate voters.

I am proud to have been an original cosponsor of S. 1992. Although not a member of the Subcommittee on the Constitution, I participated in the extensive hearings on these matters conducted between January 27 and March 1 of this year. For that opportunity and the courtesy shown me at those hearings I again, thank the Subcommittee Chairman.

I fully expect this Committee to act promptly and favorably in reporting S.1992 to the Senate. I do not wish to slow that process but hope that a few brief observation may dispel some of the misconceptions being voiced by opponents of this measure and speed our favorable action of this most important matter.

First is the unfounded fear of "racial quotas" being invoked by some in opposition to the proposed amendment to section 2 of the Voting Rights Act. Arguments couched in terms of "logical consequences" and arithmetic extremes are entitled to little weight in the light of experience, clear legislative history of the amendment to section 2 and proven record of judicial restraint.

The amendment to section 2 of the Act does not introduce proof of results of discrimination in a radical way; such a method of proof has always existed. Nor does the amendment to section 2 inject numbers with any new magic. Statistical evidence will remain what it has always been, a part of a showing from which a court might conclude that racial discrimination in the denial or abridgement of voting rights has been established.

In reapportionment cases not involving claims of discrimination no plaintiff is required to prove the unlawful "purpose" of the legislature in its uneven drawing of district lines. Numbers almost purely and simply have prevailed. In the context of charges of racial discrimination, numbers have assumed and will likely continue to assume a less prominent role as one part of the fabric of the claim.

Neither I nor any of the other cosponsors of the perfecting language to section 2 have spoken in favor of "racial quotas". Indeed, the bill passed by the House, the Senate bill 65 of us have cosponsored and the compromise language Senator Dole has proposed each expressly disavows the intention and result with which opponents seek to color the debate.

The House bill and S.1992 proclaim:

"The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."

And the Report of the House Committee on the Judiciary explained:

"The proposed amendment does not create a right of proportional representation. Thus, the fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population does not, in itself, constitute a violation of the section although such proof, along with other objective factors would be highly relevant. Neither does it create a right to proportional representation as a remedy." House Report No. 97–227 at 30.

If that language left any doubt in others' minds, that being introduced by Senator Dole leaves no room for misunderstanding:

"The extent to which members of a protected class have been elected to office in the State or political subdivision is one "circumstance" which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

Could there be a more direct denial or any intent to enact racial quotas? Could there be any more precise disavowal of that which incites the rhetoric of race? Let us not shrink from ensuring the fundamental rights of racial and language minorities in the land in the face of such an argument.

Indeed, let opponents of the "totality of circumstances" test come forward with cases in which the test led to proportional representation. Surely in the years it governed lower court judgments as shown most graphically by the reversals in *Jones* v. *City of Lubbock*, 640 F.2d 777 (5th Cir. 1980), and *McCain* v. *Lybrand*, Civil Act. No. 74–281 (D.S.C.), Orders of April 17 and August 11, 1980; there would have been a holding or some portent of the racial quotas opponents of the totality of circumstances test conjure forth. Let them point to an example of excess or quota making. They have not and cannot. The courts have been most careful and restrained in this regard and declare at every turn that racial quotas are not the test nor goal.

The great value of reconfirming the working test of the courts over the past decade up to the *Bolden* litigation is its utility in distinguishing those cases in which a racial or language minority has been effectively fenced out of the political process from those in which a group has merely failed to participate given an equal opportunity or been unsuccessful in electing representatives of its choice given a fair chance.

In this regard, I think it important to note, if only briefly, why I favor the "totality of circumstances" test over the proof of purpose requirement recently enunciated by Justice Stewart in his plurality opinion in *Mobile* v. *Bolden*.

In this civil law context we are properly concerned with and focusing upon the harm to racial and language minority citizens. It is the injury to their fundamental political right, the right to vote, that we are seeking to prevent.

It is at least quizzical that so many of our colleagues who now contend a "purpose" test is needed in this civil law setting were supporters of a weaker, objective standard in connection with establishing a criminal violation for the release of information with reason to believe it would identify a covert agent of our intelligence forces. We should pay closer attention to traditional legal standards and values.

In this setting the objective totality of the circumstances test is especially fitting. The importance of the rights involved and difficulty of proving purpose in accordance with the plurality opinion in *Bolden* combine to demand this remedial legislation. Indeed, the test enunciated by Justice Stewart for three remaining members of the Court calls for proof not of intent but of the yet higher standard of purpose. This test seems to exceed even the traditional standard of intent used in the criminal law for proof of wrongdoing and requires the highest, most demanding test of subjective will.

Proving the intentions of an individual defendant is difficult enough; proving the collective, subjective purpose of a legislature or series of governing political bodies is a sociological, historical and psychological enterprise of the most enormous scope. When the evidentiary record does not contain the crudest racial epithet or "smoking gun," the outcome may well depend on the availability of a century-long historical record, such as that which reinstated the *Bolden* holding of discrimination on remand. The rights of racial and language minorities should not be made to depend on the admission of racial motivation or availability of such extensive local, historical records.

The totality of the circumstances test, on the other hand, has much to commend it. It does not require the charge or, when proven, the brand of racism. It does not involve the federal judiciary in probing the unexpressed motivations of state legislative or executive action. It does not reward sophisticated, well-disguised discrimination by erecting an onerous burden of proof. Nor should we engage in the vagaries of motivational analysis in a remedial statute to protect this fundamental right to participate in this society by voting for those who will govern.

This is not to say that countervailing governmental purposes and interests cannot be advanced. They, too, may be shown as "circumstances" to be considered. But elusive direct evidence of discriminatory purpose should not be required to prevail. That is what may be required by the plurality in *Bolden*.

The nature and extent of the evidence necessary in accordance with *Bolden* has most recently and solicitously been characterized as "fraught with ambiguity." *Perkins* v. *City of West Helena*, Civil Action No. 81-1516 at 13 (April 13, 1982). In his dissent in *Bolden*, Justice White lamented the plurality's "leav(ing) the courts below adrift on uncharted seas." *Mobile* v. *Bolden*, 446 U.S. 55, 103 (White, J.) (dissenting). What is apparent is that traditional rules governing inferences from facts and circumstances, the rules that make it possible to prove most civil and criminal cases, do not pertain. The plurality demands not just proof of intent but proof of purpose and motivation.

Whether or not such an exacting standard is appropriate for proof of a constitutional violation, it is, in my view, too onerous to provide sufficient protection to the voting rights of racial and language minorities, which rights are in turn their best source of protection from other forms of discrimination and oppression. Let us not forget what it is precisely that we are doing. We are reestablishing a statutory standard by which to protect against discrimination in voting. The Congress' power and authority is drawn from the enforcement clauses of the fourteenth and fifteenth amendments and our ability to enact remedial legislation as has been confirmed by the United States Supreme Court. *City of Rome* v. *United States*, 446 U.S. 156, 173-78 (1980); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325-26 (1966). Accordingly, I favor revising the Voting Rights Act to clarify its reach and expressly establish the totality of circumstances test as that governing section 2 cases.

The Chairman. We have nine members present now.

Senator Baucus. Mr. Chairman, my understanding of the rules is that we need only nine members for amendments. We have nine. Ten is needed only for reporting out a bill.

Mr. Chairman, I suggest that some of the staff check the rules, but I think the rules do provide that action on amendments may be taken.

The Chairman. That suits me because a lot of them are absent many times. I would like to have that checked.

Senator Dole. I could introduce the amendment.

Senator East. Mr. Chairman?

The Chairman. We have nine now. These matters are important. I think they ought to be here and hear what the different members have to say on these matters and on the amendments, too.

Senator Kennedy. As I understand, we were going to go through a discussion period before any of the amendments were considered. There is no reason that we cannot do that. I think that that was understood by the members at the time of the recess.

The Chairman. Are you ready to go through discussion?

Senator East. Mr. Chairman?

Senator Hatch. Why do we not do that?

The Chairman. The committee will come to order. We will go through the discussion period hoping one more will come in.

Senator East. Mr. Chairman, I would just like to inquire again on this matter of a quorum for our discussions. Every day I restate my position, which I am happy to do. I like to think I have been as reasonable in terms of a willingness to move this along as anyone can be. I have only asked for the opportunity to have a quorum.

The Chairman. I think we ought to have. This is a very important measure. But Senator Laxalt has come in now, and that gives us a quorum.

Senator East. That is fine.

The Chairman. We now have a quorum. We will proceed. Senator Hatch?

Senator Hatch. Mr. Chairman, I would like to engage in just a little bit of a dialog with Senator Dole on his amendment. It would be extremely helpful to me and, I believe, to the legislative history of this amendment if just a few fundamental matters could be briefly discussed.

My first question: Representative Sensenbrenner, the author of the House disclaimer provision, testified before the subcommittee that the proposed results test in section 2 and the effects test in section 5 were virtually the same. Would you agree with that observation?

Senator DOLE. Let me make two comments. Again, before I make any comment, I want to thank the distinguished Senator from Utah for his statement. I know it is a statement made because of his deep conviction and concern. I would say to the Senator from Utah that I think most of us have the same concern. That is why I think it is important that we properly respond to the questions that you have addressed. I will do that to the best of my ability; but I think, in order that we make certain that we make a proper record, I might ask, if nobody objects, an opportunity to maybe more fully address the questions in separate views or in some other statement.

Senator HATCH. That will be fine with me.

Senator DOLE. The section 5 effects test is different from the results test of *White* v. *Regester*. The House report, as the Senator indicated, was ambiguous as to whether the *White* test or the section 5 effects test should apply. Thus, an added benefit of the compromise that it makes clear that the *White* approach should apply by directly codifying language from that decision in section 2.

So, the answer to that question is no. Under section 5 the burden of proof is shifted to the covered jurisdiction and the rule of *Bexar* v. *United States* applies, which is essentially where the minority voters are disadvantaged by change. Under section 2, on the other hand, the totality of circumstances must be examined in light of the various factors spelled out in *White* to determine if the political processes are equally open.

I would say again I think that is the strength of the change. We are talking about access and whether or not the system is open.

Senator HATCH. During the subcommittee hearings, former Assistant Attorney General for Civil Rights Drew Days testified that a neighborhood that happened to be primarily black would be absolutely immune to a political gerrymander even if that gerrymander were carried on for partisan or for ideological reasons. Do you agree or disagee with that view?

Senator DOLE. I do not agree with that.

Senator HATCH. Is it your intent that your amendment carry forward as closely as possible the test in *White* v. *Regester?*

Senator DOLE. Yes. In fact, I anticipated that question might be asked.

The answer, obviously, is yes, we are carrying forward the *White* test. We are carrying forward the principle in the *White* case that the discriminatory results are determined by examining the totality of the circumstances. Those circumstances do not require a showing of intent. I could read more fully from the *White* v. *Regester* opinion, but again I can state that in separate views.

Senator HATCH. Then you are claiming that you are carrying forth the *White* v. *Regester* test?

Senator DOLE. We are carrying forth the *White* v. *Regester* test. The results test used in our compromise is explained in *White*. It was followed for 7 years and did not require proportional representation. It did not invalid at-large election systems either.

Senator HATCH. Is it your view that, given the facts as they existed in Mobile when that case was before the Supreme Court, that the city should have been found to be in violation of section 2 and the 15th amendment?

Senator DOLE. I think my answer to that would be yes, but I would want to reserve the right to more fully explain it in separate views and we make the record we want to make.

Senator HATCH. That would be fine.

Does your amendment preclude the courts from imposing proportional representation as a remedy for a section 2 violation?

Senator DOLE. It does not preclude the court. In fact, I might say that one of the suggestions offered was that we do that by statute. It has been asked, I guess in effect, why do we not expressly apply this disclaimer to remedies? Such language was considered but rejected as unnecessary. Fears that the court would consider the disclaimer in determining whether there is a violation but ignore it in fashioning the remedy are unwarranted. It is a well-established legal principle that remedies must be commensurate with the violation established.

Senator HATCH. Everything else being precisely equal as far as the totality of circumstances, if a community with a ward system of government has been found not to be in violation of section 2, could a system that differed only with respect to having an at-large system be in violation of section 2 under your amendment?

Senator DOLE. It is not my intent that that happen; but, again, I would want to more fully address that in separate views or in the report itself.

Senator HATCH. Can you share with us a few factors that you believe would be important to a court in determining whether or not "equal opportunity to participate" in the political process of the community had been denied?

Senator DOLE. I think it gets back to what we consider to be totality of circumstances. Typical circumstances include a history of official discrimination, racist campaign tactics, racial polarity in voting, unresponsive elected officials, and the use of voting practices or procedures which enhance the opportunity for discrimination.

Those are just some that we have taken, but there may be other circumstances. It would depend on the circumstances involved.

Senator HATCH. Is this amendment designed primarily to insure equal access to the electoral process as opposed to equal outcome?

Senator DOLE. Yes; equal access, as I have indicated previously—and, again, I could read directly. In fact, our language, in effect, codifies *White* v. *Regester*: Were not equally open to participation; its members had less opportunity than did other residents to participate in the political process.

That is precisely what it is addressed to.

Senator HATCH. Under the effects test in section 5, in determining the impact of an action upon minorities, it is at least possible to compare the change in law or procedure with the status quo to determine this impact. When we are referring to preexisting circumstances as in section 2, how do we make these kinds of comparisons in order to determine whether or not the results test has been satisfied?

Senator DOLE. I think on that question I would want to reserve my answer until I have looked at that section and the cases, if that is satisfactory.

Senator HATCH. That will be fine.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Dole, I have a question here.

Senator DOLE. I wonder if I first might offer the amendment.

[Text follows:]

Strike all after the enacting clause and insert in lieu thereof the following:

SECTION 1. That this Act may be cited as the Voting Rights Act Amendments of 1982.

SEC. 2. Subsection (a) of section 4 of the Voting Rights Act of 1965 is amended by striking out "seventeen years" each place it appears and inserting in lieu thereof "nineteen years".

(b) Effective on and after August 5, 1984, subsection (a) of section 4 of the Voting Rights Act of 1965 is amended—

(1) by inserting "(1)" after "(a)";

(2) by inserting "or in any political subdivision of such State (as such subdivision existed on the date such determinations were made with respect to such State), though such determinations were not made with respect to such subdivision as a separate unit," before "or in any political subdivision with respect to which" each place it appears;

(3) by striking out "in an action for a declaratory judgment" the first place it appears and all that follows through "color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.", and inserting in lieu thereof "issues a declaratory judgment under this section.";

(4) by striking out "in an action for a declaratory judgment" the second place its appears in all that follows through "section 4(f)(2) through the use of tests or devices have occurred anywhere in the territory of such plaintiffs.", and inserting in lieu thereof the following: "issues a declaratory judgment under this section. A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action—

"(A) no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2);

"(B) no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote;

"(C) no Federal examiners under this Act have been assigned to such State or political subdivision;

"(D) such State or political subdivision and all governmental units within its territory have complied with section 5 of this Act, including compliance with the requirement that no change covered by section 5 has been enforced without preclearance under section 5, and have repealed all changes covered by section 5 to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment;

"(E) the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 5, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 5; and no such submissions or declaratory judgment actions are pending; and

"(F) such State or political subdivision and all governmental units within its territory—

"(i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;

"(ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this Act; and

"(iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

"(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting changes in such levels over time, and disparities between minority-group and non-minority-group participation.

"(3) No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated.

"(4) The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices. Any aggrieved party may intervene at any stage in such action.";

(5) in the second paragraph—

(A) by inserting "(5)" before "An action"; and

(B) by striking out "five" and all that follows through "section 4(1)(2).", and inserting in lieu thereof "ten years after judgment and shall reopen the action upon motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year period referred to in this subsection, would have precluded the issuance of a declaratory judgment under this subsection. The court, upon such reopening, shall vacate the declaratory judgment issued under this section if, after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within that State or subdivision, determines that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision which sought a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such

State or subdivision, or if, after the issuance of such declaratory judgment, a consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds"; and

(6) by striking out "If the Attorney General" the first place it appears and all that follows through the end of such subsection and inserting in lieu thereof the following:

"(6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with setcion 292(d) of title 28 of the United States Code."

"(7) The Congress shall reconsider the provisions of this section at the end of the 15 year period following the effective date of the amendments made by this Act."

"(8) The provisions of this section shall expire at the end of the 25 year period following the effective date of the amendments made by this Act."

SEC. 3. Section 2 of the Voting Rights Act of 1965 is amended to read as follows:

"SEC. 2(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

"(b) A violation of subsection (a), is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one "circumstance" which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

SEC. 4. Section 203(b) of the Voting Rights Act of 1965 is amended by striking out "August 6, 1985" and inserting in lieu thereof "August 6, 1992".

SEC. 5. Title II of the Voting Rights Act of 1965 is amended by adding at the end the following section:

"VOTING ASSISTANCE

"SEC. 208. Any voter who requires assistance to vote by reason of blindness, disability or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer."

SEC. 6. Except as otherwise provided in this Act, the amendments made by this Act shall take effect on the date of the enactment of this Act.

The CHAIRMAN. That will be fine. We can act on it now.

Senator DOLE. The amendment is sponsored by myself and is cosponsored by Senators DeConcini, Grassley, Mathias, Kennedy, Metzenbaum, Biden, and Simpson. There may be others who would like to join us in cosponsoring it.

The CHAIRMAN. Are you offering this amendment as a substitute?

Senator DOLE. Yes.

The CHAIRMAN. As a substitute for the committee recommendation?

Senator DOLE. Yes.

The CHAIRMAN. All right. Senator East, do you wish to speak on this now? Or do you wish to wait until this vote is taken?

Senator DOLE. It is still open to amendment.

The CHAIRMAN. Yes, it is still open to amendment. It will be open to amendment now or——

Senator DOLE. After it is adopted.

Senator EAST. I have some amendments that I would like to offer, yes, to Senator Dole's amendment. As I understand the procedure——

The CHAIRMAN. Would not it be better then to vote on this? If his amendment is adopted, then you would offer that. If it is not adopted, then there would not be any need to offer it.

Senator EAST. His amendment is a first-degree amendment to the committee report, is it not?

Senator DOLE. It is in the nature of a substitute.

Senator EAST. I would like to offer second-degree amendments then to that.

The CHAIRMAN. I am sure no one would object to your offering it.

Is there any objection to his offering any amendments to this amendment after it is acted on?

I think, in view of that, we might have a vote on this amendment that you are offering, the compromise amendment, to the committee action.

Senator EAST. But that would not then preclude offering any amendments.

The CHAIRMAN. That would not preclude you from offering any amendments that you wish to this compromise amendment.

Is there any discussion on this amendment?

If not, are you ready to vote?

The clerk will call the roll.

The CLERK. Mr. Mathias?

Senator MATHIAS. Aye.

The CLERK. Mr. Laxalt?

Senator LAXALT. Aye.

The CLERK. Mr. Hatch?

Senator HATCH. No.

The CLERK. Mr. Dole?

Senator DOLE. Aye.

The CLERK. Senator Simpson.

Senator SIMPSON. Aye.

The CLERK. Mr. East?

Senator EAST. No.

The CLERK. Mr. Grassley?

Senator DOLE. Aye by proxy.

The CLERK. Mr. Denton?

The CHAIRMAN. No by proxy.

The CLERK. Mr. Specter?

Senator SPECTER. Aye.

The CLERK. Mr. Biden?

Senator BIDEN. Aye.

The CLERK. Mr. Kennedy?

Senator KENNEDY. Aye.

The CLERK. Mr. Byrd?

Senator BIDEN. Aye by proxy.

The CLERK. Mr. Metzenbaum?

Senator KENNEDY. Aye by proxy.

The CLERK. Mr. DeConcini?

Senator KENNEDY. Aye by proxy.

The CLERK. Mr. Leahy?

Senator KENNEDY. Aye by proxy.

The CLERK. Mr. Baucus?

Senator BAUCUS. Aye.

The CLERK. Mr. Heflin?

Senator HEFLIN. Aye.

The CLERK. Chairman Thurmond?

The CHAIRMAN. No.

The CLERK. The Dole substitute passes by a vote of 14 to 4.

The CHAIRMAN. The Dole substitute is the vehicle we are working upon.

Senator East, you can now offer any amendments.

Senator EAST. Thank you, Mr. Chairman.

First I would like to turn to this question of voting assistance.

The provision here section 208, under section 5, dealing with voting assistance in Senator Dole's compromise says:

> Any voter who requires assistance to vote by reason of blindness, disability or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer.

I would like to offer an amendment deleting that section for voter assistance where there is inability to read or write. Let me explain my concern, Mr. Chairman.

First of all, ironically all of this began with the problem of literacy tests. Now, interestingly, in the compromise version here we have a literacy test interjected. We now have to determine whether someone could read or write, so we have to have people in the polling booth that would come out and certify that so and so cannot read or write. That is my first concern.

Of all things to pop up in this discussion is a literacy test.

Second, Mr. Chairman, I think the potential for abuse of the election process is enormous. Now, assistance is to be given by a person of the voter's choice. That leaves open an enormous Pandora's box for people swarming over a polling place. For example, Mr. Chairman, this traditionally is done and I would argue that the State and local government can handle this. They have historically done it. They can do it today. There is no need for us to intervene and start dictating, regulating, manipulating and controlling.

Second, to the extent that we did mandate it, and I do not think we should, why not let it be someone who is a part of the voting apparatus, that is in the precinct duly chosen and appointed? Perhaps a precinct worker or judge, something of that sort.

The first thing I would like to do, Mr. Chairman, is to offer an amendment which has been passed out to this section 5.

Section 5 is amended by deleting the following: ", disability or inability to read or write."

If we leave that in, we are back to the literacy tests, and I do not think it is a move in the right direction.

[The amendment offered by Senator East follows:]

> Section 5 is amended by deleting the following: ", disability or inability to read or write", and inserting in lieu thereof: "or disability".

Senator **Dole**. I was just wondering if Senator Metzenbaum, who was the author of the original amendment, is on his way?

Senator **Kennedy**. I would be glad to comment, or we can wait until Senator Metzenbaum arrives. If you want to take up another one, fine, whatever you want to do. I think there is an easy answer for this. It is Senator Metzenbaum's amendment. Maybe we could go to another amendment.

Senator **Dole**. He is on his way.

Senator **Mathias**. Mr. Chairman.

The **Chairman**. Senator Mathias.

Senator **Mathias**. This is a subject that has had a lot of attention in this whole span of debate. In the other body it was of particular concern to Millicent Fenwick, who was concerned that there should be some help given to people who were physically unable to get into the booth, and who really required help.

Senator **East**. Of course, I am very much aware of the problems of physically disabled people voting, and blindness, and I would leave that in. The House did reject this "inability to read or write." I presume they were troubled with the literacy test requirement.

Senator **Kennedy**. If the Senator would yield, it has been the law for 17 years. This is not a new issue. The Supreme Court has ruled on this explicitly. The particular amendment which the Senator refers to was never offered in the House specifically. The Supreme Court has ruled. For 17 years there has been assistance, and it has been upheld by the Supreme Court.

The question, as I understand it, was with the development of the bill in the House. It could have been construed as undoing that accepted process and procedure and protection, so the amendment was offered and I think the history that has been established in behalf of the disabled people by Senator Metzenbaum and others who support that proposal is clear. It has been part of the law for some 17 years.

It was felt by Members of the House, and I think Millicent Fenwick concluded, that perhaps the House bill could be interpreted as undoing that protection. I think the Metzenbaum amendment makes it extremely clear, really reaffirming a process and procedure which has been accepted. I would hope that we would not retreat from it.

Senator **East**. Senator Mathias keeps referring to the word "disability." I would like to clarify. I am not talking about blindness or physical disability. Those things are obvious. I am talking about a literacy test. When you say someone has inability to read or write, that involves a test, and that is not visually obvious, Mr. Chairman. If you come in in a wheelchair to vote, or crutches, or canes, or stretchers, that is pretty obvious. It does not take any specialized test. Blindness is generally understandable, too, in terms of some sort of certification, such as a cane, seeing eye dog, or so forth.

What I am saying is that someone comes in and says I cannot read or write. How do we know that that is so? That is the triggering provision that entitles assistance by a person allegedly of your choice. I think the potential of abuse here is considerable. Again I am troubled with giving the literacy test.

With all due respect to the distinguished people on the other side of this. I think we ought to have a little more convincing argument than I have heard. I am talking about inability to read or write. Who determines that? What is the triggering mechanism in the provision here?

Senator KENNEDY. The fact is that the Supreme Court has ruled in the case of illiteracy that there could be this kind of help and assistance. That has been the law for 17 years. There has not been the case of circumstances where this particular provision has been abused.

Rather than asking us for examples, or indicating to us that this is an area which would be open to abuse, the fact is it has been a part of the law for 17 years. There is no record where there has been abuse, and the States have been policing this. We are prepared to follow that established acceptability.

Senator EAST. If the Senator would yield, if the Senator himself says there is no evidence anywhere of State or local abuse, why in the world is the Federal Government getting involved in it?

Senator METZENBAUM. May I comment on that?

The CHAIRMAN. The Senator from Ohio.

Senator METZENBAUM. As a matter of fact, there were problems. In a case in 1970, in *Garz* v. *Smith*, a case brought by a group of illiterate Mexican-Americans, there was a problem there because they just could not get the right to vote. The Court held that Texas articles which permitted assistance be given for those who were bodily infirmed and not to those who were illiterate violated the equal protection clause of the 14th amendment.

I think all we are really saying here is that it is not any new great breakthrough. It is just a question of spelling out in the statute the right of those who are either mentally disabled or blind or who are illiterate to have assistance from somebody in the voting booth. Illiteracy does not really provide a basis to keep somebody from having the right to vote.

Senator EAST. I was raising the point earlier, before you returned, that first of all, ironically it means you have to give a literacy test now in the voting process, because how would you otherwise determine whether someone was illiterate or not? It means the giving of a literacy test, one, federally mandated.

Senator KENNEDY. Where is the requirement?

Senator EAST. How else do you determine whether there is inability to read or write?

Senator KENNEDY. They would take the individual at his words. If there is going to be a violation, if that persons lies, he could be prosecuted. That is how it has worked to date. That is the way it has worked to date, for 17 years.

Senator EAST. Is there a criminal penalty in here for misleading the local election officials on that particular point?

Senator KENNEDY. There are penalties in the Voting Rights Act for false statements. They have been there for 17 years.

Senator BIDEN. Would the Senator yield? If I could respond to that, obviously the only reason why somebody would lie about not being able to write is if they were being coerced by a person behind them with a literal or figurative gun in their back, to be able to walk in and make sure that they in fact voted the way in which this person, not the alleged illiterate person, but the person with him wanted him to vote.

Obviously there is a violation of the law there if that could be proven. I would point out to the Senator that we are just as susceptible of that kind of thing occurring if someone in fact is carried in on a stretcher or is blind. We do not know whether the person who is in fact accompanying the voter is in fact coercing the voter.

That is the issue the Senator is raising. That is the only rationale for his raising it, the only possible rationale for raising the question, not that the person who is in fact saying I cannot write is violating the law. It will be whether or not the person with the person who said they cannot read or write is in fact coercing the person.

I would argue that coercion is equally applicable to the person who goes in with a blind person, disabled person or anyone else. There is a law right now, and they can be prosecuted under this act, and under a whole range of criminal statutes relating to coercion, or the use of physical force.

The Senator has a reasonable question to ask, but I would hope he understands, as I am sure he does, that the same concerns can be raised for anyone else who walks in the booth with anyone, under any circumstances, and to suggest that someone would walk in and say they cannot write, just to be able to walk in the booth with their girlfriend or Uncle Larry—well the only reason they would do that is if in fact the person is coercing them.

There is in fact a whole range of Federal and State laws that would allow the person doing the coercing to be prosecuted.

Senator KENNEDY. If the Senator would yield, the last point I would make on this is that in a number of jurisdictions the person that walks in the booth now with the illiterate is the election official.

I think if we are really interested in the issue of coercion, we can ask who was more likely to coerce this individual, the election official at the local level, or the wife or cousin or relative of the individual himself? It seems to me this is the concept of help and assistance to illiterates being maintained by the Supreme Court decisions, and I think this is a strong amendment clarifying it, and I would hope it would be accepted.

Unless there is any further discussion, I think we should vote.

Senator DENTON. Mr. Chairman.

The CHAIRMAN. Senator Denton.

Senator DENTON. I just have a question here, Mr. Chairman, for those who are advocating this language, "inability to read or write."

It is my understanding that the voting booths have a multilingual kind of aspect. In fact, it is my understanding that Spanish, even the Aleutian tongue is used in some of the booths, and I wonder what language is referred to when one states "inability to read or write"? I just am confused by the intent.

Senator BIDEN. The answer is any language, any language whatsoever, if the person cannot understand for whom they are voting, and they just state they cannot understand that, whether it is Aleutian, or Portuguese or Swahili, if they say they cannot understand it, they cannot read or write or understand what is going on in the booth, and they need help, that is what we are talking about.

Senator DENTON. That is not what it says. It says "inability to read or write." It does not say you do not understand the language in the booth.

Senator **Biden**. Admiral, you are sounding like a lawyer now. You avoided that tendency since the time you have been here. It is clear on its face what we are talking about. That is what read or write means. Read or write, whatever the language is, that is in the language that the person is required to vote.

Senator **Mathias**. Let us vote.

Senator **East**. Let me make one final observation.

The **Chairman**. Senator, you might read the House language on this subject. Have you got the House language?

I have it here if you would like me to read it.

Senator **East**. That would be fine.

The **Chairman** [reading].

> Nothing in this act shall be construed in such a way as to permit voting assistance to be given within the voting booth unless the voter is blind or physically incapacitated.

The **Chairman**. That is how the House language reads.

Senator **East**. What we are adding is a new dimension on inability to read or write. I think it requires a literacy test. The only example we get is from Senator Metzenbaum. He says it has to do with whether you speak another language, which is not the same thing as inability to read or write. That becomes a language problem.

I will cease and desist on this, but it is another example of a lot of casual language. Senator Biden charges Senator Denton with sounding like a lawyer. I think we need a little more careful attention to the craftsmanship of our legislation.

I appreciate the admiral focusing us in on this, but I think it is another example of very casual language. The intentions are honorable, good and so on and so forth. But it is going to open up a whole can of worms in terms of our election process, lawsuits, further Federal intervention, and so on.

Senator Kennedy himself does not have an example. Senator Metzenbaum came in and said he heard about these people with a language problem, it was not illiteracy, but a language problem. It is another example of the casual Federal intervention, with no demonstrated need at all in the election process.

One thing that was true in the founding of this country, and in our Constitution, barring reasons to do otherwise, elections ought to be left to State and local government. This is just another casual intervention on it.

Mr. Chairman, I will be happy to settle for a vote on the amendment.

The **Chairman**. Senator, do you want a voice vote or a rollcall?

Senator **East**. Rollcall.

The **Chairman**. The clerk will call the roll.

The **Clerk**. Mr. Mathias?

Senator **Mathias**. No.

The **Clerk**. Mr. Laxalt?

Senator **Laxalt**. Aye.

The **Clerk**. Mr. Hatch?

Senator **Hatch**. Aye.

The **Clerk**. Mr. Dole?

Senator **Dole**. No.

The **Clerk**. Mr. Simpson?

Senator SIMPSON. No.

The CLERK. Mr. East?

Senator EAST. Aye.

The CLERK. Mr. Grassley?

[No response.]

The CLERK. Mr. Denton?

Senator DENTON. Aye.

The CLERK. Mr. Specter?

Senator SPECTER. No.

The CLERK. Mr. Biden?

Senator BIDEN. No.

The CLERK. Mr. Kennedy?

Senator KENNEDY. No.

The CLERK. Mr. Byrd?

Senator BIDEN. No by proxy.

The CLERK. Mr. Metzenbaum?

Senator METZENBAUM. No.

The CLERK. Mr. DeConcini?

[No response.]

The CLERK. Mr. Leahy?

Senator LEAHY. No.

The CLERK. Mr. Baucus?

Senator BAUCUS. No.

The CLERK. Mr. Heflin?

Senator HEFLIN. No.

The CLERK. Chairman Thurmond?

The CHAIRMAN. Aye.

Senator BIDEN. Before you announce the vote, Senator DeConcini votes no by proxy.

Senator DOLE. And Senator Grassley votes no by proxy.

The CLERK. The amendment fails by a vote of 5 to 13.

The CHAIRMAN. I want to raise this question. Senator Laxalt has called attention to the fact that there is a policy luncheon, and there are important matters to be discussed. I want to see how the Republicans feel about stopping now and going to the policy luncheon. The Senate is not in session after 1:30 for awhile. We can come back.

Senator METZENBAUM. I think we can finish right away if we just vote.

The CHAIRMAN. I am willing to go ahead.

Senator EAST. I have other amendments to offer. I want to move through them as quickly as I can. The point is I will not be finished by lunchtime. There is no way I can finish by 1 o'clock or whatever you are talking about. This is a very important piece of legislation. If we have to meet several times, I will not obstruct. I want to get these amendments now.

Senator MATHIAS. Could the Senator advise us as to how many amendments he has?

Senator EAST. It depends, frankly, on some of the others. It is not any more than Senator Kennedy offered the other day with the gun legislation. It may be a total of seven or eight.

Senator BIDEN. Let us keep going.

Senator HATCH. I think we can do it.

Senator KENNEDY. I will remind the Senator that I was prepared to have votes even when we did not have a quorum because the issue was familiar.

The CHAIRMAN. Senator Laxalt thinks we ought to stop now. This last amendment took 20 minutes.

Senator MATHIAS. Maybe we will be shorter on the others now that we understand the situation.

The CHAIRMAN. We can come back at 6 o'clock this afternoon if necessary if the Senate is out by then. I want to see how the Republicans feel.

Senator EAST. I am willing to do whatever the group likes.

The CHAIRMAN. I would like to have the Republicans who want to continue to raise their hands so we know where everyone stands.

[Show of hands.]

The CHAIRMAN. I believe we will continue.

Senator East, proceed.

Senator EAST. Regarding the same provision here on voting assistance, I would like to add this amendment that is now being passed out, Mr. Chairman.

> Section 5 is amended by adding the following before the period at the end of the sentence: ", or officer or agent of the voter's union".

Right now my concern is, Mr. Chairman, that this only applies to a voter's employer or agent. I think we also want to, of course, eliminate any potential abuse as regards officer or agent of the voter's union. I think that would be appropriate. What you are suggesting is someone neutral as regards the employment situation, so there would not be undue economic coercion, either by the employer or from the union leadership. It would make for a more balanced amendment.

Senator KENNEDY. Does this mean if the brother is a member of the union or the wife is a member of the union that they would be prohibited from providing assistance?

Senator EAST. If he is an officer or agent of the voter's union, that would be correct, just as if his brother or brother-in-law was an employer or agent. It says the voter's employer or agent, and I am suggesting if management cannot do it, it is leaving open the option that unions could do it, and I am saying an officer or agent of the voter's union to make a neutral position as far as the person advising on voting if in fact you are illiterate.

I am ready to vote.

Senator MATHIAS. Let us vote.

Senator SIMPSON. Just a minute. I do not want to delay this, but this already says "employer" under section 5.

Senator EAST. It now provides for employers, but does not include unions. What you have here, if you pass it as is, it means people will come in and plead inability to read or write, and the union leadership could direct them into the polling booth.

Senator KENNEDY. The only point I would make on this is I think the employer has the capability of firing someone where the union member cannot. I do believe in some parts of the country that is true.

Senator EAST. It often is not true where there are strong, powerful unions, that would not be true. If you are trying to have an economically neutral person advise on the vote, I do not see why you would exclude the management side but not the labor side. Come now, let us admit this is not a neutral posture here. I think we ought to focus on it.

Senator METZENBAUM. Let us vote.

The CHAIRMAN. Any other comments? Are you ready for a vote?

Senator DENTON. What about party officials of the Republican, Democratic or Communist Party? I am responding to Senator Biden. I would have to say that we do write regulations in the Navy and we do give orders, and we try to write them or give them in such a way that they are clear. I think this implication of the employer or his agent not being able to go in there is something more than clarity—may be partisanship or demagoguery even and not clarity. I say that about the previous one that we voted on.

Senator BIDEN. Let us clarify by a vote.

The CHAIRMAN. Call the roll.

The CLERK. Mr. Mathias.

Senator MATHIAS. No.

The CLERK. Mr. Laxalt.

Senator LAXALT. Aye.

The CLERK. Mr. Hatch.

Senator HATCH. Aye.

The CLERK. Mr. Dole.

Senator DOLE. Aye.

The CLERK. Mr. Simpson.

Senator SIMPSON. Aye.

The CLERK. Mr. East.

Senator EAST. Aye.

The CLERK. Mr. Grassley.

[No response.]

The CLERK. Mr. Denton.

Senator DENTON. Aye.

The CLERK. Mr. Specter.

Senator SPECTER. Aye.

The CLERK. Mr. Biden.

Senator BIDEN. No.

The CLERK. Mr. Kennedy.

Senator KENNEDY. No.

The CLERK. Mr. Byrd.

[No response.]

The CLERK. Mr. Metzenbaum.

Senator METZENBAUM. No.

The CLERK. Mr. DeConcini.

[No response.]

The CLERK. Mr. Leahy.

Senator LEAHY. No.

The CLERK. Mr. Baucus.

Senator BAUCUS. No.

The CLERK. Mr. Heflin.

Senator HEFLIN. Aye.

The CLERK. Chairman Thurmond.

The CHAIRMAN. Aye.

Senator KENNEDY. Senator DeConcini votes no by proxy.

Senator DOLE. Senator Grassley voted aye by proxy.

Senator BIDEN. Senator Byrd votes no by proxy.

The CLERK. The amendment passes by a vote of 9 to 7.

Senator MATHIAS. If I could observe that that vote has now increased the intrusive effect of the Federal Government into the electoral process.

The CHAIRMAN. Let us go ahead.

Senator East, did you want to bring up the next amendment?

Senator EAST. Mr. Chairman, the next amendment I would like to take up has to do with this question of bailout. I do not wish to put an undue burden on Senator Dole but, interestingly here on bailout language that he is endorsing, we have 5 pages of bailout. I would defy anybody here to systematically go through and tell me what this means.

Mr. Chairman, the sum and substance of it means there is no reasonable bailout. It is so loaded with vague language. It is so loaded in favor of the potential of the Federal Government simply lodging this objection or that, that as a simple practical matter, Mr. Chairman, for those who have read it with care and attention there is no reasonable bailout. For example, we are told they must show constructive efforts to do this, constructive efforts to do that, or shall present evidence of this or that. I do not wish to put an undue burden on Senator Dole. Perhaps he could do it. If one walks through this and looks at the bailout language, there is no bailout. It is a filter. It is an obstacle course that no one will be able to get through. I think that is a fair and reasonable assessment of it.

What I am offering here as an amendment is one that I feel is fair. It is reasonable. It is achievable. It is an incentive to the State or subdivision thereof to move ahead and to achieve the goal. That is a positive public policy. But where, Mr. Chairman, your bailout provisions are so impossible to meet, it has a negative impact.

What we ought to be trying to do in devising this legislation is move public policy in the direction where State and local government will have an incentive and will take their own positive measures to get out from under this control. This bailout is heavyhanded. It is punitive. It is impossible to meet.

Ironically, Mr. Chairman, it is somewhat like the original literacy test that some have criticized. No one could ever meet the test, and hence it was used to discriminate, and I am suggesting here if you look at this bailout, it is cast in the same tone. No one can ever meet it. No one will ever get out from under it. The State and local government will have no incentive to do so.

I am offering a substitute bailout amendment. You have it before you. It would provide this, which I think is clear, and I think it is substantial, and what it would do again would be provide incentives for State and local government to move in constructive, progressive positive way out from under the Federal control. I might note to the gentlemen who have been quoting from the President this morning, he has in fact been supporting a reasonable bailout provision.

My amendment would provide that State or political subdivisions show that during 5 years preceding commencement of the action and during the pendency of such action, the State or political subdivision thereof, as the case may be, has not engaged in violations of any provision of the Constitution or laws of the United States with respect to discrimination in voting on account of race or color, or in contravention of the guarantees of subsection (f)(2), other than violations which were trivial, promptly corrected and not repeated.

So if ~~prior~~ to 5 years of making application for bailout there were no offenses, and if there were any, they were so trivial, promptly corrected and not repeated. To me that is simple. It is a meetable standard. It is a fair standard. It will give the cast here to bailout, to move the States in the direction of getting out from under. It is a good thing and has a positive ring to it. This other bailout is negative. It is punitive. I do not think it is becoming to either political party, if we are representing Central Government, and treat State and local government in such a shabby way as to hold out a mirage and illusion of bailout when in fact it is not there under this provision.

I am offering this amendment with regard to bailout.

[The amendment offered by Senator East follows:]

On page 1, beginning with line 3, strike out through line 14 on page 8 and insert in lieu thereof the following: That section 4(a) of the Voting Rights Act of 1965 is amended—

(1) by striking out "seventeen" each place it appears and inserting in lieu thereof "twenty-seven"; and

(2) by striking out "ten" each time it appears and inserting in lieu thereof "seventeen".

(b) Section 4(a) of the Voting Rights Act of 1965 is further amended—

(1) by inserting "(1)" after "(a)";

(2) by inserting after the second sentence of the first paragraph of such subsection the following new paragraph:

"(2) Notwithstanding any other provision of this subsection, a declaratory judgment shall issue before the expiration of the twenty-seven year period referred to in the first sentence of paragraph (1) or the seventeen-year period referred to in the second sentence of paragraph (1), as the case may be, with respect to any State or political subdivision thereof, if the State or political subdivision shows that during the five years preceding the commencement of the action and during the pendency of such action the State or political subdivision, as the case may be, has not engaged in violations of any provision of the Constitution or laws of the United States with respect to discrimination in voting on account of race or color, or in contravention of the guarantees of subsection (f)(2), other than violations which were trivial, promptly corrected, and not repeated.";

(3) by inserting "(3)" before "An action" in such section;

(4) by inserting "(4)" before the first paragraph of section 4(a) that begins with "If the Attorney General"; and

(5) by inserting "(5)" before the second paragraph of section 4(a) that begins with "If the Attorney General".

Senator KENNEDY. Mr. Chairman, just to take a minute of the time. I know Senator Hatch's committee has gone into very considerable detail of the precise language of the bailout provisions. The House went into it in very, very considerable detail. I think the language is clear. It is explicit. It has been 10 years of finding a record which demonstrates that there has not been the elements of discrimination and some positive aspects which would indicate positive efforts, I believe is the precise language which would permit the communities to bail out.

The Acting Attorney General testified, and he indicated he believed they were up to about 20 communities, I believe, 20 percent of the communities that are so covered now, that would possibly be eligible by 1984. I would hope that we could maintain this provision. It is an essential part of our whole legislative proposal.

We would reject the East amendment.

Senator DOLE. Mr. Chairman.

The CHAIRMAN. Senator Dole.

Senator DOLE. I would just say very briefly there was no effort to shorten that period on the House side that I know of.

Senator KENNEDY. That is correct.

Senator DOLE. For reasons stated I think it should be rejected.

Senator BIDEN. Let us vote.

The CHAIRMAN. Senator Dole, what do you think would be a reasonable time for them to allow them to bail out?

Senator DOLE. I think the present House provision, which is complicated, as Senator East suggests, what we have done in preclearance areas is to change perpetuity clause to 25 years with a 15-year mandatory review. I thought that was an improvement. I have agreed that based on that change that I would stick with that provision.

Senator MATHIAS. Mr. Chairman, the House provision was a genuine compromise from previous law, and was a movement to accommodate those who were concerned that bailout was too tough. We have really covered this ground, I think, in the compromise bill.

Senator HATCH. Let me correct one thing, Senator Kennedy said that Brad Reynolds said that "20 percent of the covered communities could bail out under the House provision." I do not think he said that.

The CHAIRMAN. Speak louder, please, Senator Hatch.

Senator HATCH. Am I misconstruing what you said, Senator Kennedy?

Senator KENNEDY. When Reynolds testified, the data that he did provide the committee was consistent with those which have been testified to by civil rights groups in terms of the number of communities that would be eligible in 1984. I would incorporate that at this point in the record.

Senator HATCH. That would be fine.

Senator KENNEDY. I think they have indicated there would be a number of communities that have complied with the law for a period of 10 years, and also indicated positive effort to make sure there would be meaningful voting rights.

The CHAIRMAN. I noticed in the President's statement that he is endorsing the compromise. He specifically made this statement:

"I recognize there are other concerns about the bill now before the Judiciary Committee. Among these is a desire for reasonable bailout provision."

In other words, the White House and the Justice Department have been concerned about this. The President has recommended a reasonable bailout.

Does anyone have anything else to say?

The clerk will call the roll.

The CLERK. Mr. Mathias?

Senator MATHIAS. No.

The CLERK. Mr. Laxalt?

Senator LAXALT. Aye.

The CLERK. Mr. Hatch?

Senator HATCH. Aye.

The CLERK. Mr. Dole?

Senator DOLE. No.

The CLERK. Mr. Simpson?

Senator SIMPSON. No.

The CLERK. Mr. East?

Senator EAST. Aye.

The CLERK. Mr. Grassley?

Senator DOLE. No by proxy.

The CLERK. Mr. Denton?

Senator DENTON. Aye.

The CLERK. Mr. Specter?

Senator SPECTER. No.

The CLERK. Mr. Biden?

Senator BIDEN. No.

The CLERK. Mr. Kennedy?

Senator KENNEDY. No.

The CLERK. Mr. Byrd?

Senator BIDEN. No by proxy.

The CLERK. Mr. Metzenbaum?

Senator KENNEDY. No by proxy.

The CLERK. Mr. DeConcini?

Senator BIDEN. No by proxy.

The CLERK. Mr. Leahy?

Senator LEAHY. No.

The CLERK. Mr. Baucus?

Senator BAUCUS. No.

The CLERK. Mr. Heflin?

Senator HEFLIN. Aye.

The CLERK. Chairman Thurmond?

The CHAIRMAN. Aye.

The CLERK. The amendment fails 6 to 12.

Senator EAST. May I move to my next amendment?

The CHAIRMAN. You may proceed.

Senator EAST. The next one deals with our discussion over the results versus intent test, Mr. Chairman. I am introducing an amendment here clarifying that at-large elections do not violate section 2.

Specifically, on page 8, at the end of line 22, add the following: "Provided, the practice of electing representatives and officials in at-large elections shall not be evidence of a violation under this section."

This has been something we have been agonizing over, whether at-large elections would conceivably be imperiled by this legislation. There has been general agreement here they ought not to be.

Senator DeConcini has indicated that would greatly shock him. We have some 18,000 municipalities in this country totally, and we have over two-thirds of them having at-large elections. I think this would give us an opportunity to go on record, making clear we will be impairing the at-large election concept.

Mr. Chairman, I offer the amendment in that spirit, and I am happy to hear any discussion, and then I will be ready to move to vote.

[The amendment offered by Senator East follows:]

On page 8, at the end of line 22, and the following: "Provided, the practice of electing representatives and officials in at-large elections shall not be evidence of a violation under this section."

Senator Mathias. Mr. Chairman.

The Chairman. Senator Mathias.

Senator Mathias. It seems to me we have discussed at great length here the fact that we would consider all the circumstances involved in any given situation. I do not believe I could support an amendment which said that you would exclude the fact that there was an at-large election as one of the attendant circumstances, that it would not be evidenced.

Senator East. If I might respond to the Senator, I was noting earlier that from 1900 to 1920 at-large elections were brought into this country, and they were to get away from the ward system that was looked upon ass the corrupt system in American politics, having nothing to do with race. That is why cities in the name of better government went to at-large elections, and the city council form of government, and many other things as part of that historical legacy.

Now, what you are doing in the name of dealing with the 15th amendment, you run the risk of eliminating at-large elections. Everybody agreed you would not want to do that. That is not our intention or purpose.

Why not go on record and make the law clearly state that would not be evidence?

I think it would be very constructive and positive contribution to this legislation. That is the historical background of it, Senator Mathias. I greatly respect your judgment. I am simply saying that the at-large election serves a valuable purpose and democratic political theory because it requires candidates to build that concensus that Madison was talking about in Federal Number 35. Let us not imperil that in the name of trying to solve some other problem, namely the problem of discrimination based upon race. Let us not go in here with a Constitution wrecking crew, or whatever you want to call it.

The at-large election is viable, good concept. It has good historical antecedents in American politics, having absolutely nothing to do with race. Let us maintain it. Let us go on record as maintaining it. That is the spirit in which I offer it.

Everybody seemed to agree they would not want to jeopardize at-large elections any way. I would hope there would be good support for it, Mr. Chairman.

The Chairman. Are there any further comments?

Senator Simpson.

Senator Simpson. Mr. Chairman, in looking at that, I could only be attracted to it if it said something about the practice of electing representatives and officials in at-large elections shall not in itself be evidence of violation under this section.

The Chairman. Do you want to amend your amendment?

Senator East. No, sir. Then you are putting it in a suspect category that somehow or other at-large elections are evil things to keep people from voting because of some reason. That simply is not true. That is no different than the current language that we have.

At-large elections are a good idea. The American people have them and want them. I think for us to intrude in the name of some problem to the 15th amendment is unwarranted and indefensible, and personally I will not accept that. I greatly respect Senator Simpson in terms of his insight and understanding of these issues, but I cannot in good conscience accept that.

Senator HATCH. Will the Senator yield?

Senator EAST. Yes.

Senator HATCH. You just want to remove the fact of an at-large system of government as a factor in finding a violation?

Senator EAST. As a consideration.

Senator HATCH. In the absence of your amendment, the lack of proportional representation with an at-large system of government would violate the new section 2.

Senator EAST. Exactly. I want at-large elections out, period. They are not evidence of a violation of this section.

Senator HATCH. We will see if there is sincerity in not wanting to overturn at-large election processes that are not expressly designed to achieve proportional representation——

Senator EAST. Everybody seems to be saying, well, of course not, we would not want to do that, and then when you present a very concrete proposal to exempt it, then you get a little backing and a feeling of, well, you know we would not want to do that. There is nothing like the law saying what we mean, Mr. Chairman, rather than simply goodwill, but pious protestations to the contrary, heavens no, we would not mean that.

Then you say, that is good. Let us put it in the law. When you do that, you say we would not want to do that. With all due respect to my distinguished colleagues, we have to fish or cut bait here. Either we mean it or we do not. We should go on record. That will be good for the courts and policymaking process in this country. We are deciding it, and there would not be some blooming court deciding it for us. We are going to this kind of legislation, and we ought to be clear in what we are doing.

I want to make it precise. We should have some specific standards in here. I thought everybody was in favor of protecting at-large elections.

Senator HATCH. Would the Senator yield? I would like to bring this up. There are probably 12,000, or two-thirds of 18,000 municipalities in the Nation which have adopted at-large systems of election.

In addition, of the 50 largest school boards in the United States, approximately two-thirds of them use at-large election systems as well. It is an important issue.

I think the Senator has raised an important and worthwhile amendment. I just want to point that out.

Senator HEFLIN. Might the Senator yield for a question?

I notice you use the word "evidence" which precludes the introduction whether or not of any evidence, whereas at large it might have an effect on something else in order to build a factor. You might have to take evidence of four or five things to produce a factor. The use of the word "evidence" would preclude any consideration whatsoever. Is that true?

Senator EAST. That is true. I feel that, as we have already indicated, and Senator Hatch has, that the at-large election is a valid concept in our election process, in the democratic political theory in the United States today, that it deserves to be protected from elimination by collateral matter.

Senator **Kennedy**. The language we have included is *White* v. *Regester* language. Senator Simpson in his inquiry basically would incorporate the *White* v. *Regester* holding. Under *White* v. *Regester* there have been two dozen cases on this issue. If I could have the attention of the Senator, please. This language is *White* v. *Regester*. There have been in excess two dozen cases. The chairman of the subcommittee is familiar with the record that has been made. In a number of those circumstances, there has been dismissed—well, I have been listening time in and time out about good old Boston. It so happens that one of those cases was brought in Boston and dismissed.

This was prior to the time that blacks were elected to the city council or elected to chairman of the school board, so *White* v. *Regester* test is the one that is here. It has been cleared by the court. I think to alter it or change it is a disservice to the at-large election concept. I would hope it would not be accepted.

The **Chairman**. Any further comment?

Senator **East**. I would like to give a response to the question of Senator Heflin. The at-large election is considered as evidentiary matter, but it could not be used as evidence of violation. There might be other ways that one might introduce it for whatever reasons that I maybe at the moment could not foresee or he or anyone else. I am simply saying he could not introduce it as evidence of a violation because then that implies it had a racial basis to it. I am contending that the at-large election does now stand and ought to be allowed to stand on its own merit.

The **Chairman**. Any further comment?

Senator **Denton**. Just one thing.

The **Chairman**. Senator Denton.

Senator **Denton**. I do not want to support racist policy. I do not look with favor upon a city with 49-percent black and 51-percent white having no blacks in their elected officialdom. I think that is deplorable.

We have an exception, I guess, with Mayor Bradley where there is a majority of whites having elected to what is considered to be the best man. I am all in favor of that.

The general spirit that concerns me is any indication to people in States like mine that rather than trying to come up with a truly progressive plan which tends to eliminate the discrimination in voting or in the general feeling of discrimination or application of it, that you have a red flag being waved at them which is counterproductive to progress in racial relations. I have been in fights in my own hometown as a kid. They used to throw rocks at black maids wearing white uniforms waiting for streetcars. I would fight those guys. I have had my teeth chipped and nose bloodied up about that. But that feeling is leaving. I just hate to see the progress of its leaving diminished by a perception that we are slapping in the face those southern cities, counties, and communities which want to be bettered that way and are being bettered that way. That is the thing that bothers me about some of the wording of these things.

Some of my votes are going to be cast in that mode.

Senator **Biden**. Let us vote.

Senator **Dole**. We are talking about totality of the circumstances. That is the reason for the language. That is why I do not think it is necessary.

The **Chairman**. Are you ready to vote?

Call the roll.

The **Clerk**. Mr. Mathias.

Senator **Mathias**. No.

The **Clerk**. Mr. Laxalt.

Senator **Laxalt**. Aye.

The **Clerk**. Mr. Hatch.

Senator **Hatch**. Aye.

The **Clerk**. Mr. Dole.

Senator **Dole**. No.

The **Clerk**. Mr. Simpson.

Senator **Simpson**. No.

The **Clerk**. Mr. East.

Senator **East**. Aye.

The **Clerk**. Mr. Grassley.

Senator **Dole**. No by proxy.

The **Clerk**. Mr. Denton.

Senator **Denton**. Aye.

The **Clerk**. Mr. Specter.

Senator **Specter**. No.

The **Clerk**. Mr. Biden.

Senator **Biden**. No.

The **Clerk**. Mr. Kennedy.

Senator **Kennedy**. No.

The **Clerk**. Mr. Byrd.

Senator **Biden**. No by proxy.

The **Clerk**. Mr. Metzenbaum.

Senator **Kennedy**. No by proxy.

The **Clerk**. Mr. DeConcini.

Senator **Kennedy**. No by proxy.

The **Clerk**. Mr. Leahy.

Senator **Leahy**. No.

The **Clerk**. Mr. Baucus.

Senator **Baucus**. No.

The **Clerk**. Mr. Heflin.

Senator **Heflin**. No.

The **Clerk**. Chairman Thurmond.

The **Chairman**. Aye.

The **Clerk**. The amendment fails 5 to 13.

The **Chairman**. Senator, do you have another one?

Senator **East**. I shall move to my next one. I would like to note parenthetically, before I pass on, I think this at-large election problem—well, I would have had other amendments which I will not offer because of time, and I realize they would have been defeated, and these amendments would have been on the question of annexation, staggered terms, and these things are all going to be in jeopardy when this goes through. I think when State and local officials realize that, I think we will be getting some sort of concern here in the Nation's Capital. Now, these amendments would have been on at-large election, annexation and staggered terms which will now be in jeopardy because of this new legislation. This committee has already indicated they want to let at-large elections be a suspect classification as regards our problem here, and I presume they would feel the same way on annexations and staggered terms, so I shall not, Mr. Chairman, pursue that point.

Mr. Chairman, my next amendment will deal with results tests that we have here before us. We have been over this territory extensively. I shall not bore my distinguished colleagues by reciting the various arguments against the results and effects test. I have indicated that this morning in my opening remarks and others have commented on it, and I suppose we have exhausted this subject perhaps to the point of going ad nauseam.

What I would like to inquire of Senator Dole is on this results tests, a very fundamental point, if he could just answer it for me, please. I would appreciate it, does he envision results test here in his compromise as being based upon the 15th amendment or the 14th amendment or both or what? Where do we stand on this? I think the answer to that is critical as to whether I might wish to offer some additional amendments here.

Senator DOLE. What we have done, as I indicated before, we have kept the House language and we had added a section which, in effect, codifies *White* versus *Regester*.

Senator KENNEDY. If the Senator would yield, as I understand it, it includes both the 14th and 15th amendments. We have implementing powers under the 14th and 15th amendments. That has been reaffirmed time in and time out by the Supreme Court. Basically we are incorporating the *White* v. *Regester* case.

Senator DOLE. That is correct. I am trying to find the specific language. It covers both amendments.

Senator EAST. I think that is helpful to my decision. Here is my point, Mr. Chairman. If, as Senator Dole and Senator Kennedy are saying, it does involve the 14th amendment of *White* versus *Regester*, once we get into the 14th amendment we have equal protection problems. I think we ought then, if we are going to go this road, I do not agree with the analysis, but if that is what this committee is deciding to do, and the majority of them, and I gather they are, since it is not a 15th amendment problem, which is race and color, and that is what I thought was frankly the fundamental piece of legislation involved, but once you introduce *White* v. *Regester*, once you introduce the 14th amendment, you open up a whole new area of constitutional concern; namely the protection clause of the 14th amendment which forbids unreasonable classifications, not only on the basis, of course, in this case of racial color but also involving sex and religion. I would also like to offer an amendment that would include sex and religion here, Mr. Chairman, at broadening the coverage of this act.

Senator HATCH. Mr. Chairman, could I comment on that?

Senator EAST. First, I would like to offer an amendment where sex would also be included. I do not think if we are going to move in this direction of protecting results in elections, it ought not be confined strictly to race. It ought to include the sexes. Ultimately I think we would want to make sure people are not excluded from results and effects based on religion. As James Madison warned in Federal No. 35, once we go into this area, life gets complicated. Having agreed to jump into it in the 14th amendment, we might as well bite the bullet and cover those major categories, not only of race but also of sex and religion.

I am offering the amendment, and I will again cease and desist so that we might vote on it dealing with sex.

[The amendment offered by Senator East follows:]

Section 3 is amended by striking the following: "race or color" and by inserting the following before", or in contravention"; "race, color, or sex"

The **Chairman**. Any comment? Are you ready to vote?

Senator **East**. This would extend the same protection to women that you are extending in the case of race.

Senator **Kennedy**. Does this put you down as a cosponsor of the equal rights amendment?

Senator **East**. No; it does not. But what I am yielding to is the inevitability of what this committee is doing. I am saying if they are doing that, and the rationale is the 14th amendment, then we ought to, of course, include these other categories, and I am sure they would look favorably on this since they are so disposed to such things as the ERA, as the distinguished Senator from Massachusetts is.

Senator **Mathias**. Mr. Chairman, it seems to me it is unwise principle to legislate for problems that do not exist. Have there been any problems of discrimination of this sort? There is one thing we do not need in this country, and that is laws that are not absolutely required. This is somewhat reminiscent of the experience we had when Judge Howard Smith moved the same amendment on the Civil Rights Act of 1964. I believe, unless there is compelling evidence that there is a problem of this sort, I would be constrained to vote against supplying a remedy for a problem that does not exist.

Senator **Denton**. Senator Mathias, if I may, I do not dispute your major premise. I believe that the addition of women here was demonstrated—well, I note there are only 2 women Senators in this body of 100, and were we to include proportionality as a consideration one would have to wonder whether or not there is a problem. Frankly, I would have no problem with the President of the United States being a woman. In fact, all things being equal right now, I do not know that we could not use a Margaret Thatcher or a grandmother. She has a lot more sense than most of us men have.

I agree with you. That has not been a voting discrimination problem in the sense that race has so I would probably vote against the amendment. But it does raise that interesting point about proportionality of representation respecting women.

Senator **Simpson**. Mr. Chairman, my problem here is what does this do to preclearance? What does this do to preclearance calculations and figuring? We are back to the drawing board on that, are we not, with this kind of amendment?

Senator **East**. Senator, I see absolutely no problem whatsoever. The same standards that you are now applying to problems of race in voting, you would be applying to sex in voting. When the distinguished Senator from Maryland says he does not see there is any evidence of a problem, I would simply say with women being 52 percent of the Nation's population, they come nowhere representing that kind of percentage——

Senator **Mathias**. We are talking about voters. We are not talking about who gets elected.

Senator **East**. We are talking about effects and results, Senator. That is the whole purpose of this. We will look at the final results. That means you look at percentages. It means you look at what sort of representation does the allegedly excluded group have in the final product? That is what all this is about.

Senator **Hatch**. Would the Senator yield? I am going to vote against his amendment, but I would like to observe that the chairman of the Department of Government at the University of Virginia, Professor Abraham, had this to say during the hearings: "Only those who live in a dream world can fail to perceive the basic thrust and purpose and inevitable result of new section 2." I submit that this "compromise" section 2 is not going to be any different in result or effect, to use some terms that have been batted around. "It is to establish a pattern of proportional representation now based upon race. Perhaps at a later moment in time, upon gender or religion or nationality."

So I am going to vote against this amendment because I disagree with the present section 2, not primarily this amendment.

The **Chairman**. Call the roll.

The **Clerk**. Mr. Mathias.

Senator **Mathias**. No.

The **Clerk**. Mr. Laxalt.

Senator **Laxalt**. No.

The **Clerk**. Mr. Hatch.

Senator **Hatch**. No.

The **Clerk**. Mr. Dole.

Senator **Dole**. No.

The **Clerk**. Mr. Simpson.

Senator **Simpson**. No.

The **Clerk**. Mr. East.

Senator **East**. Aye.

The **Clerk**. Mr. Grassley.

Senator **Grassley**. No.

The **Clerk**. Mr. Denton.

Senator **Denton**. No.

The **Clerk**. Mr. Specter.

Senator **Specter**. Aye.

The **Clerk**. Mr. Biden.

Senator **Biden**. No.

The **Clerk**. Mr. Kennedy.

Senator **Kennedy**. No.

The **Clerk**. Mr. Byrd.

Senator **Biden**. No by proxy.

The **Clerk**. Mr. Metzenbaum.

Senator **Biden**. No by proxy.

The **Clerk**. Mr. DeConcini.

Senator **Biden**. No by proxy.

The **Clerk.** Mr. Leahy.

Senator **Leahy.** No.

The **Clerk.** Mr. Baucus.

Senator **Baucus.** No.

The **Clerk.** Mr. Heflin.

Senator **Heflin.** No.

The **Clerk.** Chairman Thurmond.

The **Chairman.** No.

The **Clerk.** The amendment fails 2 to 16.

The **Chairman.** Senator East, do you have other amendments?

Senator **East.** Yes. I think as I have indicated, the question of sex is very pertinent here. We have a 14th amendment problem. Also the question of religion I think is pertinent.

I think the question of religion involves also a substantive problem in terms and effect of results in areas where you have groups of a dominant religious character, perhaps Jewish, or whatever, that where you have results or effects that do not to some degree reflect the general cultural interests, that is a deficiency.

Again I am suggesting to include only race in these categories, and I do not find, if you are talking about the 14th amendment and equal protection—well, I find that arbitrary, contrary to the spirit and letter of the 14th amendment.

The **Chairman.** Any other comments?

[The amendment offered by Senator East follows:]

Section 3 is amended by striking the following: "race or color" and by inserting the following before ", or in contravention": "race, color, or religion"

The **Chairman.** Call the roll.

The **Clerk.** Mr. Mathias?

Senator **Mathias.** No.

The **Clerk.** Mr. Laxalt?

Senator **Laxalt.** No.

The **Clerk.** Senator Hatch?

Senator **Hatch.** No.

The **Clerk.** Mr. Dole?

Senator **Dole.** No.

The **Clerk.** Mr. Simpson?

Senator **Simpson.** No.

The **Clerk.** Mr. East?

Senator **East.** Aye.

The **Clerk.** Mr. Grassley?

Senator **Grassley.** No.

The **Clerk.** Mr. Denton?

Senator **Denton.** No.

The **Clerk.** Mr. Specter.

Senator **Specter.** Aye.

The **Clerk.** Mr. Biden?

Senator **Biden.** No.

The **Clerk.** Mr. Kennedy?

Senator **Kennedy.** No.

The **Clerk.** Mr. Byrd?

Senator **Biden.** No by proxy.

The **Clerk.** Mr. Metzenbaum?

Senator **Biden**. No by proxy.

The **Clerk**. Mr. DeConcini?

Senator **Biden**. No by proxy.

The **Clerk**. Mr. Leahy?

Senator **Leahy**. No.

The **Clerk**. Mr. Baucus?

Senator **Baucus**. No.

The **Clerk**. Mr. Heflin?

Senator **Heflin**. No.

The **Clerk**. Chairman Thurmond?

The **Chairman**. No.

The **Clerk**. The amendment fails 2 to 16.

The **Chairman**. Senator, do you have another amendment?

Senator **East**. Yes, I do. I shall move promptly here, Mr. Chairman.

Mr. Chairman, this next amendment I am offering deals with the problem of the burden of proof under section 5. Let me state my position here quickly, and I will happily take the judgment of this distinguished group.

Mr. Chairman, currently the way this law is being applied in the affected areas, 9 States and 12 others, including my own, 40 out of 100 counties in North Carolina, the burden of proof is not placed upon the charging entity, the Government, the Central Government, the Attorney General, but the burden of prof has to be carried by the local government officials.

Let me tell you very quickly, and then I will take my vote, one way or the other, why I think it is ill-conceived and ill-founded.

First of all, there is a presumption of discrimination. It is the affected entity that must offer evidence to get out from under it. I find this particularly ironic in terms of the affected States, because in those States it is the Democratic Party, interestingly, if I might inject very briefly a partisan note, that controls the election apparatus. That certainly is true in my State of North Carolina. I do think State government in North Carolina, which has been overwhelmingly controlled by the Democratic Party, has a reputation for being antiprogressive in this area. Yet they must carry the burden of proof to show that they have not discriminated.

Now, whenever you have to prove that you did not do it, every lawyer knows that makes an incredibly difficult problem of evidence and presentation. You must anticipate all possible contentions of alleged discrimination by the Attorney General.

Now, every lawyer knows, and nonlawyer knows, that in Anglo-American tradition the norm is that the burden of proof is upon the charging entity. They can single out specific things, offer their proof, and let the courts or whatever make their decision.

As this law currently exists in affected States, of which I am one, and there are others on this committee in the affected States, I can appreciate those States who are not affected, and they say, oh well, ho-hum, let those good chaps suffer, they deserve it. I would hope we are in a more enlightened age in this committee and in the Senate as a whole, and we will at least make some amends as regards how section 5 of the 1965 Voting Rights Act is being applied in the affected areas, the 9 States and the 13 other partially affected, for a total of 22.

I am asking that we return to the norm of Anglo-American jurisprudence, that burden of proof is upon the charging official. It is not upon the accused.

Again we must anticipate every possible contention. It makes it impossible to do it. It is again negative public policy. I am offering an amendment which would change the burden of proof to the Attorney General, Justice Department, rather than to entities involved.

Mr. Chairman, I offer that amendment.

[The amendment offered by Senator East follows:]

On page 8, between lines 14 and 15, insert the following:

SEC. 2. Section 5 of the Voting Rights Act of 1965 is amended by inserting "(a)" after the section designation, and by striking out all that follows "1972," in such section and inserting in lieu thereof the following: "the chief legal officer or other appropriate official of such State or subdivision shall submit such qualification, prerequisite, standard, practice, or procedure to the Attorney General. Such qualification, prerequisite, standard, practice, or procedure may be enforced sixty days after submission to the Attorney General unless objection has been interposed by the Attorney General. If the Attorney General interposes an objection, then such qualification, prerequisite, standard, practice, or procedure may not be enforced for an additional ninety days unless the Attorney General withdraws the objection. If during the additional ninety-day period the Attorney General institutes an action in an appropriate United States district court for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure has the purpose or the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), then such qualification, prerequisite, standard, practice, or procedure may not be enforced until the United States district court enter final judgment denying relief or until the Attorney General withdraws the action for declaratory judgment, or otherwise withdraws the objection that had been interposed. Such qualification, prerequisite, standard, practice, or procedure may be enforced at any time thereafter. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

"(b)(1) It shall be the duty of the chief judge of the circuit (or in his absence, the acting chief judge) in which the case is pending immediately to designate a panel of three judges to hear and determine the case.

"(2) It shall be the duty of the judges designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.".

On page 8, line 15, strike out "SEC. 2." and insert in lieu thereof "SEC. 3.".
On page 8, line 23, strike out "SEC. 3." and insert in lieu thereof "SEC. 4.".
On page 9, line 1, strike out "SEC. 4." and insert in lieu thereof "SEC. 5.".
On page 9, line 6, strike out "SEC. 5." and insert in lieu thereof "SEC. 6.".

The CHAIRMAN. Any comments?

Senator KENNEDY. One brief comment. Under this existing procedure, most of the jurisdictions that have made applications for change have been able to meet this particular requirement. It has worked effectively in place. It is understood by the various jurisdictions. There are only a small number that have not been able to comply with it. Since it is known and has been effective, I would hope that it would be maintained. I would hope the amendment would be defeated.

Senator EAST. I would simply respond and retort the comments that the Senator from Massachusetts makes, that this has been incredibly vexing and indefensible, and in good conscience, representing my State of North Carolina, and I think to a considerable extent I would speak for the affected States in this country, in the Southeast and other parts, that this is a slap in the face. It is vexatious. It is no longer defensible or justifiable.

We ought to show at least some constructive positive attitude, even a small olive branch of this kind, that their judgments, their record does warrant the burden of proof now coming out of the Attorney General's Office, rather than the reverse.

Again, with all due respect to the Senator from Massachusetts, those from the unaffected States, so typically I find in America today, concerning the role of central government, that everybody is always casual about legislation, Mr. Chairman, if their States are not affected. It is always easy to say, let them plow down on them. My State is not involved, they say.

It is a little bit like busing. You remember everybody thought it was a good idea, as long as it was going on in North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Louisiana. When they started doing it in other parts of the country, goodness gracious, there were problems and complications.

All I am asking, Mr. Chairman, is that our area of the country, and those affected, this a very small, modest thing. Burden of proof: let the Attorney General carry the burden. They have plenty of lawyers over there that can do it. We will try to defend ourselves in courts. Do not treat us in what I think is a second class situation. That is what we are doing.

I am just communicating to you a southern feeling on this. I think I am typical on it. I think it is a fair issue. Let them decide. This section 5 of the 1965 act is regional in application, and it is punitive. It is punitive, Mr. Chairman. You know it, and I know it, in terms of application in South Carolina and in North Carolina, let alone the rest of the South.

The CHAIRMAN. Are there any other comments?

Call the roll.

The CLERK. Mr. Mathias?

Senator MATHIAS. No.

The CLERK. Mr. Laxalt?

The CHAIRMAN. Aye by proxy.

The CLERK. Mr. Hatch?

Senator HATCH. Aye.

The CLERK. Mr. Dole?

Senator DOLE. No.

The CLERK. Mr. Simpson?

Senator SIMPSON. No.

The CLERK. Mr. East?

Senator EAST. Aye.

The CLERK. Mr. Grassley?

Senator GRASSLEY. No.

The CLERK. Mr. Denton?

Senator DENTON. Aye.

The CLERK. Mr. Specter?

Senator SPECTER. No.

The CLERK. Mr. Biden?

Senator BIDEN. No.

The CLERK. Mr. Kennedy?

Senator KENNEDY. No.

The CLERK. Mr. Byrd.

Senator BIDEN. No by proxy.

The CLERK. Mr. Metzenbaum?

Senator BIDEN. No by proxy.

The CLERK. Mr. DeConcini?

Senator BIDEN. No by proxy.

The CLERK. Mr. Leahy?

Senator LEAHY. No.

The CLERK. Mr. Baucus?

Senator BAUCUS. No.

The CLERK. Mr. Heflin?

Senator HEFLIN. Aye.

The CLERK. Chairman Thurmond?

The CHAIRMAN. Aye.

The CLERK. The amendment fails 6 to 12.

Senator EAST. I shall move on. I know the group is anxious for lunch and other things.

I would like to turn to the next amendment, which is already in your folders, Mr. Chairman, and that is the venue amendment. It deals with section 5 of the 1965 Voting Rights Act. I would appreciate a very brief discussion on this, and then a vote.

I feel as strongly on this as I do on burden of proof, perhaps more so. The problem is what, Mr. Chairman? Again, under section 5 of the 1965 Voting Rights Act the affected States have to come to the District of Columbia, the district court, in order to get a hearing.

I know again those people from States not affected well, may not be too interested. Let me just try to state our concern here, and what will again be a double standard in this total act.

Section 2 would not require it for the rest of the country, but section 5 will require it as regards the affected States again, which I come from one.

First of all, Mr. Chairman, I think it is an unfair assumption to assume that the district courts in the districts involved cannot give a fair hearing. Mr. Chairman, you know as well as I do—you are a distinguished attorney—that you start with a proposition in Anglo American law that the place of trial is in the place where the alleged offense is supposed to have taken place, unless you can offer compelling evidence to the contrary, then you move the place of trial, change the venue.

What we have done here is we have built into the 1965 law the presumption irrefutable that you can only try these cases in the Federal District Court in the District of Columbia. Interestingly, I find those supporting this proposition are in a rather strange position. These are the very people opposed to the court stripping bill of jurisdiction.

What the 1965 law has done, and will continue to do, is you are stripping away jurisdiction of the lower Federal courts in the affected areas from hearing these cases. You have taken away their jurisdiction. Only the district court in the District of Columbia can hear it.

If the assumption is that these district courts in the affected areas simply lack impartiality to hear these cases, I think that is a very serious indictment; and if it is true, I think we ought to impeach those judges and get them out of there, and get judges in there that can be fair and impartial in this day and age.

This presumption of prejudice is no longer a viable assumption in our time. It is burdensome, Mr. Chairman. It involves cost and travel. It is availability of witness problem.

To my point, Mr. Chairman, the normal procedure is in the appropriate court of the United States. That is what my amendment would do. If you want to change the venue, you would of course, as always, have to show cause.

I end on this point, Mr. Chairman. The most perverse thing about the current venue requirement is this. Under Anglo American law what you are entitled to under the Constitution is a bias-free venue. Interestingly, the 1965 Voting Rights Act so skews venue as to give you a prejudiced one. The assumption clearly is that the district courts in the District of Columbia will lean in the direction of finding against the affected States. That is one of the most wretched and tortured uses of the venue problem of which I am aware. You skew the law to guarantee a venue where you are more likely to get a finding of guilt. It is not even predicated upon the idea of a neutral venue. It is a prejudiced one against affected States. It is vexatious. It is unwarranted. It is indefensible, in my judgment. The affected areas, I can tell you, feel very strongly about this, Mr. Chairman.

I do not profess to speak for all Senators and Congressmen from those areas, but I have had enough contact with them to know there are an awful lot of people in the southeastern part of the United States that are affected by this law that strongly agree with what I am asking for.

I offer the amendment to the committee for a vote.

[The amendment offered by Senator East follows:]

On page 9, between lines 7 and 8, insert the following:

Sec. 5. (a) Section 4(a) of the Voting Rights Act of 1965 is amended—

(1) by striking out "the United States District Court for the District of Columbia" each place it appears and inserting in lieu thereof "an appropriate United States district court";

(2) by inserting "(except as otherwise provided in this subsection)" after "accordance".

(b) Section 5 of the Voting Rights Act of 1965 is amended—

(1) by striking out in the first sentence of such section "the United States District Court for the Distict of Columbia" and inserting in lieu thereof "an appropriate United States district court";

(2) by inserting in the last sentence of such section "(except as otherwise provided in this subsection)" after "accordance".

(c) Section 14 of the Voting Rights Act of 1965 is amended—

(1) by striking in subsection (b) "the District Court for the District of Columbia" and inserting in lieu thereof "an appropriate district court":

(2) by striking in subsection (d) "the District Court for the District of Columbia" the first time it appears and inserting in lieu thereof "a district court":

(3) by striking out from subsection (d) "the District of Columbia" the second time it appears and inserting in lieu thereof "the district in which such action for declaratory judgment has been brought"; and

(4) by striking out from subsection (d) "the District Court for the District of Columbia" the second time it appears and inserting in lieu thereof "the district court".

(d) The amendments made by subsections (a), (b), and (c) of this subsection shall take effect on August 6, 1982.

On page 9, line 8, strike out "Sec. 5" and insert in lieu thereof "Sec. 6".

Senator Simpson. Mr. Chairman.

The Chairman. Senator Simpson.

Senator **Simpson**. Mr. Chairman, some may know I have been very supportive of all attempts to remove venue from the District of Columbia courts on issues that are of primary interests in the communities in which these cases take place, particularly with regard to public lands and other issues. But throughout that long haul, and Senator DeConcini and I have joined together on that many times, and we will have a hearing on the venue bill next week, throughout that we have always excluded any reference to civil rights cases or actions.

I am looking a the language of my bill, where I deeply believe in what the Senator is trying to approach with regard to venue, but I also deeply believe in nothing we have ever done, or I have ever done, is ever to have been construed to affect venue in an action relating to civil rights.

In line with that I will not support the amendment. In all other situations it would be very plausible and attractive to me. In this one it would not.

Senator **Biden**. Let us vote.

Senator **East**. Let me say again that I am prepared to vote. Then I would like to offer an amendment, if that is the feeling of the committee, then I think section 2 ought to have the same venue requirement, and require them to come to the district court here—section 2, you see, we are going to extend this whole thing nationwide.

So now those cases ought to be tried here in the district court. I do not see why you would have a double standard here, why you would have section 5 venue requirement to come to the District of Columbia for the affected States, and the rest of the good folks who are not under that, but will now be under section 2, in terms of trial of their cases, they go to the appropriate court. That is a double standard.

I am inquiring right now. I would be happy to put it in the amendment, whether the Senator from Wyoming would concur, because he says specifically that rights issues are unique, whether he would agree that under section 2 he would accept venue amendment that would bring it to the District of Columbia. Is there some reason to accept the judgment of Federal District Court in Wyoming as opposed to the Federal District of Alabama? He will accept it in Wyoming, and not Alabama? North Carolina has to come to District of Columbia, and Alabama has to come to District of Columbia.

It is a double standard. I will be candid with you. The South resents it, and they should. I am asking that we be consistent on this. This has been my whole purpose all the way through here. So when we go out of here, however we vote on it, at least we have thought it through, and we have hit the hard questions and made the decision. I will accept your verdict on it.

Right now we are going to have a double standard. There will be one standard for your area and one for mine, and another standard for Simpson and Biden, and so on and so forth.

Senator **Simpson**. I represent a State that has a couple of covered jurisdictions under this. They will be coming to the District of Columbia to do their labors.

I think the real issue which we come back to, however, is how we ever got into this position in the first place. This stuff never started in my State. It did not start in the State of Wyoming. We were the first State to give women the right to vote. We have a large alien population, and have a large Hispanic population, and they always voted, and did not have to go through the rigamarole that brought about the first case that got us here.

When we are talking about voting rights, we are talking about civil rights. It is pretty clear. That is where I come down.

Senator DOLE. Mr. Chairman, I would say that very briefly over the last few years the District of Columbia court has developed some expertise. They have had about 25 bailout cases, and about 25 preclearance cases. In addition, under the new law that I assume will be passed, we hope to continue to promote uniformity. There are going to be more bailout suits brought by jurisdictions throughout the country. There are going to be several hundred eligible in 1984.

I do not know what Justice would say about the new bailout criteria, they are going to be defending probably hundreds of suits at the same time, and I think that is another factor. They are, in most cases, much more convenient here. I think the fact that we have developed some expertise, that we are going to have additional cases, and also, as I understand, section 2 is a statute of general application. That is going to be next.

Senator KENNEDY. Senator, under 5, these are as the result of governmental activities. And under 2, it is the result of individual activities. It seems to me, as the Senator from Kansas pointed out, developing expertise which they have, and also the universal application is important.

I do not think in the course of these hearings we have had witnesses or objections that were seriously raised during this period of time, other than more of a desire to change venue. We did not find there were abuses, or that this particular provision was not affected.

Senator DENTON. Mr. Chairman.

The CHAIRMAN. The Senator from Alabama.

Senator DENTON. The question of where all this started was raised, and I agree that not only did discrimination in voting start in the South, but I agree that slavery was the cause of the Civil War. I think there would be unanimous vote in the South to the effect that they are glad the North won.

The point is that in the South they have been through the horror, and they are coming out of it. And I think the aim of this Government should be to assist them to come out of it, not rub their noses in the fact that something started down there. It may have started down there, but it has moved to Chicago, Detroit, other places, and is not being coped with there as well as it is in the South. An imposition of double standard, on the basis of where it started, I find an indication of the kind of spirit that is behind the specifics of this new rewrite, and as much as I admire and respect my colleague, and I hope dear friend from Wyoming, I wish that they would not be too reminiscent of where things started, and rather think more about where things are, and where we hope that they will go.

Senator SIMPSON. I agree with that, Mr. Chairman. That is why I say that they cover jurisdictions within my State. I am right in the ballpark with you, but I sure would not retract one thing about what I said.

Senator SPECTER. On the issue of venue, I think as a general matter it ought to be localized. But when it comes to this particular issue, I think it ought to remain in the District of Columbia.

The **Chairman.** The clerk will call the roll.

The **Clerk.** Mr. Mathias.

Senator **Mathias.** No.

The **Clerk.** Mr. Laxalt.

The **Chairman.** Aye by proxy.

The **Clerk.** Mr. Hatch.

Senator **Hatch.** No.

The **Clerk.** Mr. Dole.

Senator **Dole.** No.

The **Clerk.** Mr. Simpson.

Senator **Simpson.** No.

The **Clerk.** Mr. East.

Senator **East.** Aye.

The **Clerk.** Mr. Grassley.

Senator **Dole.** No.

The **Clerk.** Mr. Denton.

Senator **Denton.** Aye.

The **Clerk.** Mr. Specter.

Senator **Specter.** No.

The **Clerk.** Mr. Biden.

Senator **Biden.** No.

The **Clerk.** Mr. Kennedy.

Senator **Kennedy.** No.

The **Clerk.** Mr. Byrd.

Senator **Biden.** No.

The **Clerk.** Mr. Metzenbaum.

Senator **Biden.** No.

The **Clerk.** Mr. DeConcini.

Senator **Biden.** No.

The **Clerk.** Mr. Leahy.

Senator **Leahy.** No.

The **Clerk.** Mr. Baucus.

Senator **Baucus.** Aye.

The **Clerk.** Mr. Heflin.

Senator **Heflin.** Aye.

The **Clerk.** Chairman Thurmond.

The **Chairman.** Aye.

Senator **Grassley.** Could I change my vote or vote no by person instead of by proxy?

The **Chairman.** Yes.

The **Clerk.** The amendment fails 6 to 12.

Senator **East.** Mr. Chairman, one other quick amendment here. Mr. Chairman, dealing with the question of venue.

On the basis of this vote on section 5, the affected areas of venue strips away the jurisdiction of the Federal courts and other parts of the country to hear the cases, I would like to apply the same standards of section 2 and add the following section to section 2:

[The amendment offered by Senator East follows:]

Add the following to section 2:

"In cases arising under section 2 of this Act venue shall lie only in the United States District Court for the District of Columbia."

That will make section 5 and section 2 under the same venue provision and everyone will come here. I think it will show good faith of the committee, that we do not think the district courts in the rest of the country are capable of handling it in an impartial way, because that is the import of the last vote. We shall now agree to join hands. We come together, and all of these cases will be adjudicated in the District Court for the District of Columbia.

I would prefer that we leave it to the appropriate court, but having turned me down on that, let us all join together and turn here to the Federal District Court in the Federal District of Columbia.

Senator KENNEDY. Under 5, it is the Justice Department, and under section 2, these are individual cases that can be brought in various jurisdictions where the Justice Department is not involved.

Section 2 has nationwide application. Are we going to have the Justice Department running all over the country. It is a different situation.

The CHAIRMAN. Any other comments?

Call the roll.

The CLERK. Mr. Mathias.

Senator MATHIAS. No.

The CLERK. Mr. Laxalt.

The CHAIRMAN. No by proxy.

The CLERK. Mr. Hatch.

Senator HATCH. No.

The CLERK. Mr. Dole.

Senator DOLE. No.

The CLERK. Mr. Simpson.

Senator SIMPSON. No.

The CLERK. Mr. East.

Senator EAST. Aye.

The CLERK. Mr. Grassley.

Senator DOLE. No.

The CLERK. Mr. Denton.

The CHAIRMAN. Aye by proxy.

The CLERK. Mr. Specter.

Senator SPECTER. Aye.

The CLERK. Mr. Biden.

Senator BIDEN. No.

The CLERK. Mr. Kennedy.

Senator KENNEDY. No.

The CLERK. Mr. Byrd.

Senator BIDEN. No by proxy.

The CLERK. Mr. Metzenbaum.

Senator BIDEN. No by proxy.

The CLERK. Mr. DeConcini.

Senator BIDEN. No by proxy.

The CLERK. Mr. Leahy.

Senator LEAHY. No.

The CLERK. Mr. Baucus.

Senator BAUCUS. No.

The CLERK. Mr. Heflin.

Senator HEFLIN. No.

The CLERK. Chairman Thurmond.

The CHAIRMAN. Aye.

The CLERK. The amendment fails 4 to 14.

Senator EAST. I have one final amendment, and then we shall be finished.

First, I would like to acknowledge that on this amendment Senator Cochran of Mississippi has already introduced it in the Senate for consideration as a separate bill. I commend him for that. I wish to publicly acknowledge it.

It deals again with section 5 of the 1965 Voting Rights Act. Before I present this amendment, Mr. Chairman, because that will end my presentation here, I would like to publicly commend the chairman for the great patience and leadership he has shown. I also wish to commend Senator Hatch for the very distinguished leadership he has shown on his subcommittee and all the members of that subcommittee. I would like to thank publicly every member of this committee, including our very distinguished opposition, who has been willing to move through this with us. The only thing I will admit is we did not have more extended discussion. Whether that indicated hurriedness to get through or whether that indicated, well, I do not know what it indicated.

The CHAIRMAN. We are not hurrying you. We do not have to finish this bill today.

Senator EAST. I want to thank them for their indulgence in this. I would like to think in putting this series of amendments that we have some way or other at least strengthened our understanding of what we are doing and where we are going.

My final amendment deals with nationwide application of section 5 of the 1965 Voting Rights Act.

Mr. Chairman, at the time the 1965 Voting Rights Act was voted in, you had a set of circumstances that the Congress and the President in its infinite wisdom needed to be dealt with. I would submit in the year 1982 those circumstances have changed enormously To single out a certain section of the country for regional application of the law I think is no longer the sensible under current circumstances. The law at that time was temporary for 5 years. It has been extended now for 17 years, and we are talking about going on for an even greater period of time, totally oblivious to whether any change has taken place down there.

Mr. Chairman, I know again you are a distinguished student of the Constitution. You start with the normal concept that every State has a so-called equal footing. It is the equal-footing doctrine and unless you have compelling and overriding evidence to the contrary. Today we no longer have that evidence, assuming we had it at the time. All I am asking is that we now take section 5 and we apply it nationwide. Again it would show good faith. It would be a positive step of indicating our concern for voting free of racial prejudice or bias or whatever. It is now equal to our concern in the Southeastern part of the country. What this amendment would do, and again Senator Cochran will be offering it ultimately as a bill on the Senate floor as a whole, is to extend the provision, section 5 of the Voting Rights Act of 1965, to the entire country

Senator BIDEN. Let us vote, Mr. Chairman.

Senator HEFLIN. I have an amendment which is different from his which would give nationwide coverage which I intend to discuss after Senator East completes his amendments. My amendment basically is different from his in that it would cover those areas that are not covered by sections 4 and 5 and would cover jurisdictions that are bailed out if there is a bailout. My amendment basically is based on the idea of notice and complaint, that it does not carry with it the cumbersome and, in effect, bureaucratic approach that section 5 has. Each State that would be covered under my amendment would be required to keep a registry of any change in any Voting Rights Act. Any person or organization that wanted to be notified of any change would file with the official of the State, like the Secretary of State, and any time there would be a change in the voting rights procedure or mechanism, you would have to file this with the Secretary of State and run a publication in the local jurisdiction for two consecutive weeks. The Secretary of State or the one that kept the register would then notify the Attorney General. The Attorney General would then investigate, and if the Attorney General felt there was a violation, then the Attorney General would go into court. He would not have the matter of preclearance involved in it. It would only be raised in the event there is a complaint. Notice would be given to all people concerned who want to be notified about it. There would be a publication in the local newspaper. Under the amendment that I have, it would not mean that the Attorney General would be burdened as arguments have been made about the burden would follow if you would apply section 6 nationwide.

I intend to discuss my amendment further after Senator East finishes. But, with that in mind, I will probably vote against Senator East. I think it ought to be applied nationwide, but in a less cumbersome manner and in a manner that can still protect voting rights, but do so without the cumbersome and bureaucratic approach that section 5 now has.

Senator BIDEN. Let us vote on the East amendment, Mr. Chairman.

The CHAIRMAN. Any further comment? If not, the clerk will call the roll.

[The amendment offered by Senator East follows:]

Between line 25 on page 8 and line 1 on page 9 insert the following:

SEC. 4. Section 5 of the Voting Rights Act of 1965 is amended by inserting after "November 1, 1972," the following: "or whenever a State with respect to which no prohibition set forth in section 4(a) based upon a determination made under section 4(b) is in effect shall enact or seek to administer any voting qualifications or prerequisites to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on August 6, 1982".

Redesignate succeeding sections accordingly.

The CLERK. Mr. Mathias.
Senator MATHIAS. No.
The CLERK. Mr. Laxalt.
The CHAIRMAN. No by proxy.
The CLERK. Mr. Hatch.
Senator HATCH. No.
The CLERK. Mr. Dole.
Senator DOLE. No.
The CLERK. Mr. Simpson.
Senator SIMPSON. No.
The CLERK. Mr. East.
Senator EAST. Aye.
The CLERK. Mr. Grassley.
Senator GRASSLEY. No.

The CLERK. Mr. Denton.

The CHAIRMAN. Aye by proxy.

The CLERK. Mr. Specter.

Senator SPECTER. No.

The CLERK. Mr. Biden.

Senator BIDEN. No.

The CLERK. Mr. Kennedy.

Senator KENNEDY. No.

The CLERK. Mr. Byrd.

Senator BIDEN. No by proxy.

The CLERK. Mr. Metzenbaum.

Senator BIDEN. No by proxy.

The CLERK. Mr. DeConcini.

Senator BIDEN. No by proxy.

The CLERK. Mr. Leahy.

Senator LEAHY. No.

The CLERK. Mr. Baucus.

Senator BAUCUS. No.

The CLERK. Mr. Heflin.

Senator HEFLIN. No.

The CLERK. Chairman Thurmond.

The CHAIRMAN. Aye.

The CLERK. The amendment fails 3 to 15.

The CHAIRMAN. Senator East, do you have any other amendments?

Senator EAST. I have no further amendments.

The CHAIRMAN. Senator Heflin.

Senator HEFLIN. I have explained mine. I have been able to observe that I do not believe the committee right now has enough time to study and to give my amendment the votes to pass it. I am not going to offer it at this time, but I will reserve my right to offer it on the floor. Since time is short, I believe possibly we can vote the entire bill out as of now before the time runs out.

Senator BIDEN. I move we vote the bill out.

Senator HATCH. I ask unanimous consent that an article from the New York Times, May 3, 1982, be placed in the record at this point.

The CHAIRMAN. Without objection, so ordered.

[The article referred to follows:]

[From the New York Times, Mar. 3, 1982]

VOTING RIGHTS ADVOCATES IN SOUTH PRESSING CHANGES IN REDISTRICTING

(By Reginald Stuart)

ATLANTA, May 2.—Georgia and Mississippi are waging tough court battles with the Justice Department over their Congressional redistricting plans, which the Government contends discriminate against black voters.

In Mississippi, the confrontations have forced the postponement of primary elections for the House of Representatives, and they may force Georgia to delay primaries in two districts.

The two states are the latest to be forced to reassess reapportionment plans and their effect on black voters in the face of opposition from the Government and voting rights groups.

Such opposition was a factor in decisions by North Carolina, South Carolina, Texas and Virginia to redraw their plans for Congressional redistricting or legislative reapportionment. In three of those states, the plans resolving the differences were imposed by panels of Federal judges.

ARGUMENT FOR VOTING RIGHTS ACT

Lawyers who deal with voting rights cases say the new round of legal battles in the South is evidence of continued discrimination against blacks. The course of redistricting and reapportionment in recent weeks, they say, gives further credence to arguments that Congress should pass the strongest possible extension of the Voting Rights Act.

The challenges to the plans are being made under a section of the 1965 act that gives the Justice Department final approval of changes in election procedure that may affect black or minority voters and allows it to reject any change that would dilute minority voting strength.

Defenders of the state plans say the challenges are unfounded. Jerris Leonard, a Washington lawyer who has represented Mississippi, North Carolina and Texas in their redistricting cases, discounted the complaints by voting rights activists as smokescreens for a few blacks seeking personal political gain.

RACE FACTOR DOWNPLAYED

"I wouldn't attribute race as being the overriding legislative purpose in any of those states," he said.

"Individual black politicians are becoming very sophisticated and are using the system, and that's good," said Mr. Leonard, who served as the first head of the Justice Department's Civil Rights Division in the Nixon Administration. "They are going to go for everything they can get in the system, and they should.

"So I'm not saying their charges are politically unfounded. But don't go posing for holy pictures when your motives are purely political."

When plans for redrawing of political boundaries based on new census data began to emerge, they were accused of diluting or minimizing black voter strength. The challenges have yielded mixed results.

For example, in Virginia, the Legislature held 14 special sessions and adopted five reapportionment plans before satisfying the Government and voting rights advocates. Under the new plan of single-member districts, the number of House districts with a majority of blacks increased to nine from four, and the number of majority black Senate districts rose to two from one. Currently, one state senator out of 40 is black and four of 100 representatives are black in Virginia, a state that is 18.9 percent black.

TOUGHEST BATTLES IN 2 STATES

The toughest battles are being fought in Georgia and Mississippi.

At issue in Georgia is whether two Atlanta area districts, the Fourth and the Fifth, were drawn by the State Assembly to dilute black voting strength. The Justice Department objected to the plan, basically asserting that it did not maximize black voting strength in the Fifth District.

The Legislature redrew the district to increase the black population to about 57 percent, but it discarded a plan by state Senator Julian Bond to increase the black percentage to about 69 percent.

A panel from Federal District Court in Washington agreed last week to hear the state's case, which argues that no racial motive was involved.

Mr. Bond's plan has led many whites to accuse him of trying to create a district in which he could run and win. In a recent editorial, The Atlanta Journal attacked the Justice Department's action, saying it was "solidifying proportional or quota representation for minorities."

"We see a huge difference between a Voting Rights Act and a Guaranteed Election Act, which is what the Justice Department is making it," the editorial went on.

OPPORTUNITY FOR COMMUNITY

In response, Mr. Bond said in an interview: "I want this cohesive community to have an opportunity to elect a candidate of their choice. White people see nothing wrong with having a 95 percent white district. Why can't we have a 69 percent black district?"

In Mississippi, the Justice Department has objected to a "least change" reapportionment plan, which left Congressional districts mostly untouched. The department said it objected because it had not reviewed the plan under which the current representatives were elected, as required by the Voting Rights Act.

It also asserted that the new plan fragmented the black population in the Mississippi Delta and diluted its voting strength.

Black lawmakers had pushed unsuccessfully for creating a majority black district in the heavily black Delta.

Last Monday, a three-judge panel ruled that it would impose a redistricting plan.

Mr. Leonard said race was not an issue in the Mississippians' plan. "They've got five incumbents they like," he said, "and don't want to mess them up."

The CHAIRMAN. We have a letter from the Attorney General here. Without objection, we will place that in the record.

[The Attorney General's letter follows:]

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., May 4, 1982.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your inquiry concerning the compromise language proposed for Section 2 of the Voting Rights Act.

In testimony before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee earlier this year, I praised the Voting Rights Act as "the centerpiece of those legal protections that guard against denials or abridgments of the right to vote" and urged the Congress to extend the vital protections of the Act for an additional and unprecedented ten-year period. These views were subsequently echoed in testimony by William Bradford Reynolds, Assistant Attorney General for the Civil Rights Division. At the same time, both I and Assistant Attorney General Reynolds expressed strong reservations about a House-passed amendment to Section 2 of the Act, which would eliminate the existing requirement of proving discriminatory intent and replace it with a standard of proof based solely on "results." Our principal concern—shared by many respected legal scholars, members of Congress and others—was that adoption of the vaguely worded "results" test in the House bill would invite a statistical analysis under Section 2 of the Act and thus call into question the validity of any election system in the country under which candidates backed by the minority community were not elected in numbers equal to the group's proportion of the total population. Such a system of proportional representation strikes at the heart of our Nation's commitment to traditional principles of popular sovereignty and representative democracy.

We are pleased that members of the Senate Judiciary Committee considering the issue recognized the seriousness of this concern. During the course of consideration of the Voting Rights Act it became clear that no legislator intended to Act to be interpreted as requiring a system of proportional representation. Accordingly, members of the Senate Judiciary Committee developed the bipartisan compromise amendment to Section 2 in order to preclude any such interpretation.

The Department has reviewed and analyzed the compromise language proposed for Section 2 of the Act, and we believe that the express provisions of the compromise amendment foreclose the possibiilty of an interpretation requiring proportional representation. In addition we are pleased that the members of the Senate Judiciary Committee have returned the emphasis of the Voting Rights Act to its proper focus on equal access to the political process and away from an undue emphasis on the results of any particular election. In our view this is far more faithful to the protections accorded all individuals under the Fifteenth Amendment. Accordingly, the Department supports the compromise amendment to Section 2.

We applaud this sincere bipartisan effort to address the Department s concerns regarding Section 2 of the House-passed amendment to the Voting Rights Act, and urge the full endorsement of the compromise amendment to Section 2 by both Houses of Congress.

Sincerely,

WILLIAM FRENCH SMITH,
Attorney General.

The CHAIRMAN. Are there any other statements?

Without objection, I understand Senator Specter has an opening statement that will be placed following the opening statements at the beginning of the hearing.

[Senator Specter's statement was inserted at the appropriate place in the record:]

The CHAIRMAN. Does anybody else have a statement?

Senator SIMPSON. I would just say I appreciate the thoughful work of Senator East. He is a scrapper and I admire that. I have nothing more to say.

The CHAIRMAN. I have a brief statement I want to make before we close.

We have come now to the final question of whether this bill, as amended, should be reported to the Senate. Foremost in my mind is the need to assure all Americans that the right to register and vote will be protected against discrimination of any kind.

I have been concerned that the bill in the form before us might not provide enough protection against proportional representation, but Senator Dole's response to questions on that subject has given me some confidence that his amendment is intended to respond to the charge that proportional representation will result from this legislation.

I remain concerned that the bill does not contain a truly reasonable bailout provision which would provide an incentive for concerned jurisdictions to eliminate any vestige of discrimination. I am also concerned that the preclearance provision of section 5 may remain in effect for another 25 years. In my opinion, a 10-year period would have been more than adequate in light of the progress that has been made in the concerned jurisdictions.

Nevertheless, the bill in the form before us is some improvement over the bill passed by the House and I have repeatedly stated my commitment to see that this legislation is considered as expeditiously as possible. Therefore, I am going to vote to report the bill in its present form to the Senate, while expressly reserving my right to seek improvements on the floor. I sincerely hope that after this further consideration I will be able to vote in favor of final passage in the Senate.

Is there a statement by anybody else?

Senator DOLE. I want to thank the chairman for his many courtesies extended to me and for that statement just made. I would like permission to add some material to the record which I think will further indicate the intent of our amendment which I think would satisfy the chairman, and also announce that Senator Wallop, Senator D'Amato, Senator Gorton and Senator Goldwater are now supporting the proposal.

Senator BIDEN. Let us vote.

The CHAIRMAN. Is there a statement by anyone else?

Senator KENNEDY. I would like to add a statement after the vote, but I would like to include it as if it were done before.

The CHAIRMAN. Senator Kennedy has a statement after the vote. Without objection, that will be printed.

[The statement of Senator Kennedy follows:]

The CHAIRMAN. Does anyone else have a statement before or after the vote?

Senator Mathias. After.

Senator Leahy. After.

The Chairman. Does anyone else have a statement before or after?

Senator Heflin. I may have a statement.

The Chairman. Senator Heflin.

[The statements referred to follow:]

STATEMENT OF SENATOR PATRICK J. LEAHY BEFORE THE SENATE JUDICIARY COMMITTEE, ON THE VOTING RIGHTS ACT, APRIL 29, 1982

It is unlikely that any visitor to this Committee chamber or an observer sitting in the Senate gallery would characterize us as a group of revolutionaries. Yet, the Congress less than 20 years ago accomplished through reason and rebate what most other societies have only been able to bring about through violence and bloodshed, the enfranchisement of a minority that began here as slaves and prior to 1965 were still second class citizens in many parts of the country.

This morning, we take another step in this peaceful revolution. As the first Voting Rights Act was a product of its time, so is the bill we have before us today. In reenacting this critical legislation, it is important to note that the work of the Voting Rights Act is not complete, and the idea that the franchise is available to all Americans equally has not yet become a reality.

I support S. 1992 as introduced, which is the same bill that passed the House by a 389–24 vote, after. The House wrestled for a long time over the issue of preclearance under Section 5 of the Act. Under the present law, all jurisdictions become eligible for bailout at the same time, and a state that is entirely covered is required to bailout as a unit. Based on actual experience, these provisions seemed unfair to many House Members, and they called for improvements.

But it is one thing to improve the preclearance section of the Voting Rights Act and quite another to even think of eliminating it, either explicitly or through "improvements" that disable it.

Section 5 of the Act was the force that made the Voting Rights Act of 1965 work, where earlier laws in 1957 and 1960 seemed to founder. The requirement to preclear voting changes was the beginning of a process that saw more than a million black Americans register to vote between 1965 and 1972. No longer could a state hope to retain discriminatory election schemes by fighting in court year after year, only to shift to another equallly discriminatory scheme when the first one was shot down by a federal judge. Preclearance meant that the apparently neutral change in a voting law that actually discouraged or prevented minority citizens from casting their ballots would be scrutinized before it took effect.

Section 5 has not proved to be the bureaucratic nightmare that was sometimes predicted—or hoped for—back in 1965. The past record of the Justice Department through several administrations has been exemplary, with plainly nondiscriminatory changes being processed in 60 days or less in most cases.

It is understandable, nevertheless, that states and counties that have eliminated discrimination want to bail out of the Section 5 process, however fair and expeditious it may be. There are some who fear that the compromise worked out in the House on the bailout issue is too easy to use and that the bailout will be too broad. There was criticism in the Constitution Subcommittee hearings that the tests are too stringent. I believe that liberalized bailout is a chance worth taking, because it stresses initiatives that states and counties can take to eliminate discrimination and does not simply wait for the passage of time. The bailout compromise is a product of experience and hope, and I support it fully.

Perhaps the major issues before this Judiciary Committee is the question of intent under Section 2 of the Act. If Section 5 is the engine that drives the Act and renders it enforceable as a practical matter, Section 2 is still the basic protection against discriminatory practices. Preclearance does not cover all areas and may not resolve every threatened violation where it does apply. Preclearance is designed to stop voting discrimination before it can start in covered jurisdictions, and Section 2 is calculated to end it whenever and wherever it is found.

The change in Section 2 proposed by the House bill and embodied in S.1992 is a sensible one in light of the history of the Voting Rights Act, and it is regrettable that the Constitution Subcommittee did not see fit to retain the change. It provides that a practice which results in a denial or abridgement of voting rights is prohibited. The reason for this amendment is not to tighten the law but to respond to the Supreme Court's *Mobile* v. *Bolden* decision, which is the first Supreme Court case to read a requirement of intent into the application of Section 2.

I am all too familiar with the ambiguities of the word "intent" as a former prosecutor in Vermont operating under typical criminal statutes, where the element of intent is usually crucial to the outcome of a prosecution. I was glad to work under a system of law where innocence was ardently presumed and where proof of intent protected individual rights by barring casual prosecutions. But I am convinced that the *Bolden* intent test is not needed to protect the rights of governments, and if applied in Section 2 cases will render Section 2 unenforceable.

Intent is hard enough to prove as applied to a natural person, because the pattern of individual conduct is often an ambiguous guide to the individual's intent. Even the often cited "smoking pistol" fails to clarify intent in some cases. And deriving intent from a person's spoken words is difficult because the words are usually indirect and rarely tell us, "I meant to do it because . . ."

The decision in the remand of *Bolden* by the Federal District Court of Alabama is a painful illustration of how the intent test can turn a search for the truth about the openness of an election system into a battle over ancient municipal records. Though the *Bolden* plaintiffs prevailed in this case, the demands made on them were excessive. Others may not be able to meet them.

Not only the best but perhaps the only proof of discriminatory purpose is discriminatory result. Not disproportionate result, as some have said is the secret agenda of the new Section 2, but discriminatory result. It has been hard for plaintiffs to show that at-large elections were discriminatory where dilution of voting strength has been the basis for a Section 2 action. In the decade before *Bolden*, the courts had fashioned tough standards of proof, and the small number of cases actually brought to trial since 1965 attests to the fact that the floodgates would not be opened by a return to the jurisprudence that applied before *Bolden*.

The amendment to Section 2 will continue to ask, as before, whether a particular election scheme, as a product of its normal operation, isolates racial or language minorities within the political system and denies them access to political power in a practical sense.

It is the opportunity to participate, not the actual use of that right, which is crucial. But if minorities are denied the opportunity to get to the ballot box, it is no answer to an attempt at correction that the denial is advertent or wedded to events in the dim past. Once a denial is estabilshed—and not simply a disproportionate result—it makes no sense to say we will not right the injustice because there is no evidence that anyone planned it that way.

Bolden v. *Mobile* has changed the Voting Rights Act, and I believe that we must change the words of Section 2 in order to preserve its meaning. And I hope that in marking up S. 1992 we proceed at full speed and without interruption, for time is short and history is looking on.

Senator BIDEN. Let us vote.

The CHAIRMAN. The clerk will call the roll.

The CLERK. Mr. Mathias.

Senator MATHIAS. Aye.

The CLERK. Mr. Laxalt.

The CHAIRMAN. Aye.

The CLERK. Mr. Hatch.

Senator HATCH. Aye.

The CLERK. Mr. Dole.

Senator DOLE. Aye.

The CLERK. Mr. Simpson.

Senator SIMPSON. Aye.

The CLERK. Senator East.

Senator EAST. No.

The CLERK. Mr. Grassley.

Senator GRASSLEY. Aye.

The CLERK. Mr. Denton.

The CHAIRMAN. Aye, reserving the right to change in the Senate.

The CLERK. Mr. Specter.

Senator SPECTER. Aye.

The CLERK. Mr. Biden.

Senator BIDEN. Aye.

The CLERK. Mr. Kennedy.

Senator KENNEDY. Aye.

The CLERK. Mr. Byrd.

Senator BIDEN. Aye by proxy.

The CLERK. Mr. Metzenbaum.

Senator BIDEN. Aye by proxy.

The CLERK. Mr. DeConcini.

Senator BIDEN. Aye by proxy.

The CLERK. Mr. Leahy.

Senator LEAHY. Aye.

The CLERK. Mr. Baucus.

Senator BAUCUS. Aye.

The CLERK. Mr. Heflin.

Senator HEFLIN. Aye.

The CLERK. Chairman Thurmond.

The CHAIRMAN. Aye.

The CLERK. The bill passes, as amended, 17 to 1.

Senator BIDEN. Before we adjourn, I would like to ask unanimous consent that any Senator who wishes to make any statements about this bill be able to put it in the record as if stated before the final vote. That is what I would ask unanimous consent to do.

The CHAIRMAN. Without objection, it is so ordered.

Senator BIDEN. A second point. I would also ask that the prevailing side have their report prepared within 3 days and that we be prepared to go to the floor——

The CHAIRMAN. I think we had better allow a little more time.

Senator EAST. I wanted to make sure that in terms of the record that I would be protected for getting additional views.

The CHAIRMAN. I think we had better allow 10 days on this. This is a very important matter.

Senator EAST. Appreciating your desire to move, I want to preserve my right to make sure that this record is complete.

The CHAIRMAN. We will allow 10 days for both sides.

Senator BIDEN. A total of 10 days. Can we make it 7 days?

The CHAIRMAN. I want to cooperate with you in any way I can, but I think we better make it 10.

Senator EAST. I would prefer 10 days.

Senator MATHIAS. You want the prevailing side to draft the initial report?

The CHAIRMAN. The prevailing side will draft the initial report. I am going to ask the chairman of the Constitution Subcommittee, who handled the bill all the way through, to submit the report to the Senate. I want to ask you to do that and act as floor manager of the bill.

Senator DOLE. Mr. Chairman, since it was a substitute which, in effect, was adopted by a vote of 14 to 4, which is really the same thing we just had, which was 19 to 1, I would hope that those of us—because there were four people, including the subcommittee chairman who voted against the substitute—if those of us who offered the substitute will have an opportunity to have some input into the report.

The **Chairman.** Absolutely.

Senator **Kennedy.** Can you clarify that?

The **Chairman.** All of those who voted for the bill on the prevailing side will have input into the report.

Senator **Dole.** We do not want the report dictated by somebody who really opposes it.

The **Chairman.** That will not be the case.

Senator **Mathias.** Can we submit a draft? It seems to me that those of us who were working for the compromise could submit a draft, at least the beginning.

Senator **Hatch.** Mr. Chairman, we will straighten that out. I support the bill. I did not support the Dole amendment. We will straighten that out and it will be fairly described in the report.

The **Chairman.** I do not think there will be any trouble. Senator Hatch is very fair. He has worked hard all the way through.

Senator **Dole.** I want to make certain they understand we want to work together.

Senator **Hatch.** We will work together.

The **Chairman.** The committee stands adjourned.

[Whereupon, at 2:09 p.m., the committee adjourned.]

PREPARED STATEMENT OF SENATOR ARLEN SPECTER AFTER FAVORABLE CONSIDERATION OF S. 1992 BY THE SENATE COMMITTEE ON THE JUDICIARY

I am pleased that the amendment to S. 1992 establishing a "totality of circumstances" test for violations of section 2 of the Voting Rights Act and the bill, as amended, both received the overwhelming endorsement of this Committee.

It is a significant achievement that this Committee has endorsed this expansion of protection for the voting rights of racial and language minorities. With the passage of this bill, their fundamental rights to vote and have their votes equally counted will no longer be subject to the onerous proof of purpose required by the plurality in *Mobile* v. *Bolden* to establish a claim of constitutional violation. The Committee's actions are testimony to the high regard with which all voting rights and minority rights are held.

With the President's strong, personal endorsement and the growing number of Senate cosponsors, this measure should now proceed to speedy passage. With the continued cooperation of our colleagues in the House, whose earlier action created the momentum for successful Committee consideration, we should now be able to meet our August deadline and fulfill our legislative responsibility.

I join in the laudatory expressions already directed toward the Chairman of the Committee for his steady stewardship of this matter. His fairness and leadership in the long and difficult proceedings that culminate today are greatly appreciated.

PART 2. ADDITIONAL STATEMENTS

PREPARED STATEMENT OF GRIFFIN B. BELL

Mr. Chairman:

My name is Griffin B. Bell, I am a practicing lawyer in Atlanta and have served as Attorney General of the United States and as a Judge on the United States Court of Appeals for the Fifth Circuit.

You have requested my views on the Voting Rights Act of 1982.

I am familiar with the Voting Rights Act and have been since its passage in 1965. In addition, I participated as a judge in several cases vindicating the right of black citizens to vote prior to the passage of the Voting Rights Act.

My problem with the Voting Rights Act, as it is proposed for extension, and as it has existed since its inception, is with the preclearance procedure (Section 5), which requires that judicial relief be sought in the Federal District Court for the District of Columbia rather than in the courts of the district and circuit where the issue in question exists. The federal judges in the Fifth Circuit, for example, were vindicating the rights of black citizens to vote long before Congress acted. It is a departure from the equal protection of the law and a disparagement which stigmatizes judges in the regions covered by the Act to require that relief be sought only from judges in the District of Columbia. It seems to me that a fair law would allow relief to be sought in the District of Columbia circuit or in the circuit where the issue arises, in the discretion of the appellant. It may be that the respective Court of Appeals could be charged with designating the judges to hear the case and thus the responsibility for fair administration of the law would vest in the Court of Appeals for the District of Columbia or such other circuit as may be involved. This same procedure should be followed in adjudging any bailout request under Section 4 of the Act.

It is imperative to provide a better method of review of the rulings of the Department of Justice in preclearance matters. The Department of Justice has more power than is ordinarily vested in a government agency with respect to preclearance. Often the position of the Department is viewed as arbitrary. There is no requirement for a reasoned decision. For example, the Georgia Reapportionment Plan for Congressional Redistricting has been disapproved in recent days by the Department of Justice because a district has only 57.3% black population and the Department believes that a plan offered in a State Senate Committee to provide a 70% black population should have been adopted. These are the sort of fine lines that can be viewed as arbitrary. The Department should be charged with the duty of making findings of fact as a basis for its rulings.

With respect to bailout, any political subdivision should be allowed to bailout without regard to the status of the major political entity within which it is located or of which it is a part. A good example would be Atlanta which has a black government and is a city with a population which is two-thirds black. Should Atlanta be denied bailout simply because the State of Georgia and not Atlanta has been separately designated for coverage in the Act? This kind of distinction should be provided.

My last suggestion has to do with the Mobile case. Mobile v. Bolden, 446 U.S. 55 (1980). As I understand the proposed legislation, the Mobile decision of the Supreme Court would be overruled by statute. This is an extremely dangerous course of action under our form of government. There are Supreme Court decisions rendered from time to time which displease one group or another. We are constantly faced with efforts to have the Congress overrule the Supreme Court in areas such as business decisions (Illinois Brick), prayer in school, abortions, school busing, and now the enforcement of the Voter Rights Act.

My view, based on long experience in government and out, is that the Supreme Court should not be overruled by Congress except for the most compelling and in the most extraordinary circumstances. Our law, and particularly constitutional law, depends for stability on the balance which is provided by the decisions of the Supreme Court and it is up to the people of our nation to follow the Supreme Court decisions until they are overruled or modified by the Supreme Court. The Supreme Court has its own power to overrule or modify its decisions and it is not a sound principle of government, under our system, for Congress to undertake to overrule Supreme Court decisions. Consider, for example, the great hue and cry for years in the South to overrule the Supreme Court decision in Brown v. Board of Education. Congress should be willing to carve out the Supreme Court and its decisional role in interpreting the Constitution as a sanctuary not to be invaded lightly.

I would leave the decision in Mobile to the courts for interpretation, resting assured that the courts will vindicate the right to vote and the role of black and Hispanic citizens in the political process.

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JOSEPH W. BISHOP, JR

January 21, 1982.

Senator Orrin Hatch, Chairman
Subcommittee on the Constitution
108 Russell Building
Washington, DC 20510

Dear Senator Hatch:

You have asked me to comment on a proposal to amend section 2 of the Voting Rights Act of 1965. I have indicated the words which would be deleted by placing them in brackets and the new language by underlining it.

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision [to deny or abridge] in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."

It seems to me that the intent of the amendment is to ensure that blacks or members of other minority groups are ensured proportional representation. If, for example, blacks are 20% of the population of a state and Hispanics 15%, and American Indians 2%, then at least 20% of the members of the legislature must be black, 15% Hispanic, and 2% American Indians. Despite the last sentence, a judge so minded (as many would be) could easily find that the fact that members of minority groups were not elected in numbers proportionate to their nubmers in the electorate is very strong, if not conclusive, evidence of the existence of practices or procedures which deny or abridge their right to vote. If I am right in my reading of the amendment, I believe that it is unwise and impractical, if not actually in violation of the Fifteenth Amendment.

The purpose of the Voting Rights Act has until now been to exercise the power granted Congress by section 2 of the Fifteenth Amendment to "enforce...by appropriate legislation" the provision of section 1 that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race [or] color... ." There seems to be a general consensus, as chronicled in Abigail Thernstrom's excellent article, "The Odd Evolution of the Voting Rights Act," in The Public Interest (Spring 1979), that this purpose has been largely achieved. It is no longer possible to deny or abridge a minority's right to vote by the crude or sophisticated tactics which prevailed in many states before the Act was passed, such as poll taxes, selective and discriminatory application of literacy tests, and gerrymandering. The purpose of the present amendment appears to be to require not merely that minority voters not be discriminated against, but that there be discrimination in their favor, which (in my opinion) necessarily entails the discrimination against other voters, which results (as we have seen in other contexts) when equality of result (*i.e.*, quotas) is substituted for equality of opportunity.

The amendment ignores the obvious fact that there are many reasons for the failure of minorities to achieve proportionate representation other than subtle discrimination to reduce their electoral power. They may lack funds or attractive candidates. The percentage that fails to vote may be higher than in other groups. There may be differences of political opinion within the minority group. (For example, there is a substantial and growing number of conservative black academics and businessmen.) The assumption that voters, minority or otherwise, will always choose a candidate of their own ethnic group is extremely dubious. Former Senator Edward Brooke of Massachusetts and Mayor Tom Bradley of Los Angeles are examples of black politicians elected by constituencies in which the black vote, although important, was far from a majority. Many white politicians have done well among black voters, even when they had black opponents. One group of minority voters may feel that their interests will be better served by a non-minority candidate than by one from a different minority group.

In the light of such factors as these it seems to me that the amendment to section 2 could be enforced, if at all, only be gerrymandering as crude and outrageous as that which used to be practiced in order to reduce the value of the votes of members of minority groups. If that type of gerrymandering was unconstitutional, as it was, I cannot see why gerrymandering to increase the value of their votes (and decrease the value of other people's votes) would not be equally inconsistent with the spirit of the Fifteenth Amendment and the one-man-one-vote principle.

Sincerely yours,

Joseph W. Bishop, Jr.

Richard Ely Professor of Law

JWB:np

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March 3, 1982

Mr. Stephen Markman, General Counsel
Subcommittee on the Constitution,
Senate Committee on the Judiciary
108 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Markman:

I am writing in response to your request that I comment on the proposed changes in the Voting Rights Act, as set out in the legislation (H.R. 3112) approved by the House of Representatives on October 5, 1981. I shall limit the remarks that follow to the House-passed changes in the language of Section 2 of the Act. These changes are intended to provide a firm statutory foundation for legal challenges to discriminatory electoral practices antedating the Act and to establish as sufficient proof that a practice is illegal if it operates "in a manner which results in a denial or abridgment of the right . . . to vote." According to the House Judiciary Committee's Report accompanying H.R. 3112, the changes in Section 2 would overrule the U.S. Supreme Court's holding in City of Mobile v. Bolden, 446 U.S. 55 (1980), that a showing of discriminatory intent is required in a successful challenge to an electoral practice.

I should preface my comments by noting that I have been engaged in research on the legal aspects of at-large elections for the past three years. I have enclosed with this letter a copy of a conference paper, "The Legal Status of Local At-Large Elections: Racial Discrimination and the Remedy of 'Affirmative Representation,'" which covers the litigation leading up to, but not including the Supreme Court's decision in Bolden. In that paper, I asserted that the Supreme Court ought both to affirm the lower court holdings in Bolden and to make clear that a showing of intent is the standard of proof governing cases involving claims of vote dilution. I am willing to stand by the conclusions of that paper, except to the extent that it expresses approval of the extraordinary remedy imposed by the lower courts in the Bolden case.

The substance of my reactions to the proposed changes in Section 2 are presented in response to three questions that I believe are relevant to the evaluation of the amended language: whether revision of Section 2 is premature, whether the revised language of Section 2 restores the legal standards governing dilution claims prior to Bolden, and whether the amended Section 2 provides reasonable guidance for the adjudication of suits alleging discrimination in electoral systems.

1. Are the proposed changes in Section 2 premature in view of the status of the litigation in Bolden and related cases?

The rationale for reversing the Bolden precedent through revision of Section 2, as set out in the House Judiciary Committee's Report, gives inadequate attention to several relevant aspects of the case, including the fact that it represented (see below) the first attempt of the Supreme Court to deal with the merits of a constitutional challenge to a local at-large electoral scheme. The Bolden decision produced a sharply divided court and a confusing array of opinions. A case recently argued before the Court, Rogers v. Lodge (involving at-large election of the county board in Burke County, Georgia) offers the Court the opportunity to clarify the holding of Bolden, especially with respect to the kind of evidence needed in order to satisfy the intent test. In the same vein, Bolden and its companion case, Williams v. Brown, 446 U.S. 236, (involving the at-large format for the school board in Mobile County), have been retried in district court and await decisions by the trial court judge. In light of the pendency of the Rogers case and the continuation of the Mobile litigation, it is not altogether clear to me to what extent City of Mobile v. Bolden represents settled law, with regard either to principles for adjudicating dilution claims or to the resolution of the challenges in Mobile specifically.

2. Do the proposed changes in Section 2 merely "restore the pre-Bolden understanding of the proper legal standard" for assessing dilution claims, as the House Judiciary Committee's Report (at pp. 29-30) asserts?

The plurality view of the court in Bolden held that a successful dilution claim requires not only a showing of discriminatory impact but also a demonstration of invidious intent on the part of public officials in creating or maintaining a particular electoral practice. According to the Committee Report, the plurality opinion in the Mobile case introduced an intent test that prior to Bolden had not been applied in cases involving dilution claims. The Report's assertion that the changes in Section 2 merely restore the standards of proof as they existed before Bolden, however, is deficient in at least two respects. First, as Bolden represents the first and only case in which the Supreme Court has ruled on the merits of a challenge to local at-large elections on Fourteenth and Fifteenth Awardment grounds, it can be argued that no clear standard existed prior to Bolden insofar as local at-large elections are concerned. Although the Supreme Court in Whitcomb v. Chavis (1971) and White v. Register (1973) set out criteria for the evaluation of dilution claims, those cases centered on challenges to multi-member districts in state legislative apportionment plans. In Wise v. Lipscomb (1978), a case involving the proper remedy in a successful challenge to an at-large electoral system in Dallas, Texas, four justices noted that the question of whether the principles of Whitcomb and White applied to local at-large elections had not been presented to the Court. The same four justices, interestingly, joined in the plurality opinion in Bolden.

Second, the legal standard used to assess dilution claims against at-large elections in the pre-Bolden era was more demanding than the simple effects test set out by the proposed revision of Section 2. The principal legal standard used to assess claims against at-large elections in the pre-Bolden era was the set of factors known as the Zimmer criteria, delineated in 1973 by the Fifth Circuit Court of Appeals, based on its reading of the Whitcomb and White precedents. Since the evolution and application of the Zimmer criteria are discussed at length in the appended paper ("The Legal Status of Local At-Large Elections"), I shall make only two brief points here. The Zimmer criteria arguably constitute more than an effect standard because they embrace analysis of governmental responsiveness, historical discrimination, and the policy rationale in support of at-large elections, as well as the examination of candidates' access to the ballot and patterns of racial bloc voting. Indeed, the Fifth Circuit Court in 1978, held in the Bolden case that satisfaction of the Zimmer criteria would support an inference of intent. Seemingly, the Supreme Court in Bolden disagreed with the Fifth Circuit not on the issue of whether a showing of intent is an essential element in a successful dilution claim but in the degree of proof required to demonstrate intent. Inasmuch as the Zimmer criteria constituted more than an effects test, it seems apparent that the House-passed version of Section 2, which incorporates none of the guiding language of the Zimmer criteria, does more than restore the pre-Bolden legal standards for dilution claims. Indeed, the House Report (p. 30) expressly rejects one of the Zimmer factors as too subjective, although it goes on to list a series of "objective" criteria that echo the Zimmer formula. The House standards, as statutory guidelines, seemingly would be applied more loosely than the constitutional criteria of Zimmer or White (see Report, p. 30, n. 104). The new test suggested by the Report but not embodied in the new language of Section 2 essentially holds that an at-large system or other electoral practice is illegal when racially polarized voting, within the framework of the practice at issue, minimizes the electoral opportunities of candidates favored by minority voters (Report, p. 30). In reality, the new Section 2 proposes a much less demanding standard of proof than that which existed before Bolden. To describe the revision of Section 2 as restorative is grossly misleading.

3. Does the House-passed version of Section 2 provide reasonable guidance to the courts with respect to the proper standards for adjudicating dilution claims?

The debate over intent versus effect seems a bit misdirected or ill-defined, since neither intent nor effect constitutes much of a test, if by test we mean a standard that provides ready and consistent guidance to courts adjudicating dilution claims. As I point out in "The Legal Status of Local At-Large Elections" and as the House Report notes (p. 30), the Zimmer criteria--which have the appearance of easily applicable standards--led to a series of curious and inexplicably inconsistent judgments in various cases challenging the constitutionality of at-large elections. Thus, what is at issue with regard to Section 2 is not so much intent or effect in a meaningful constitutional sense, but the development of some standard by whatever label that will serve two purposes. On the one hand, it would be permissive enough to enable minority plaintiffs to challenge electoral schemes, at large and otherwise, that truly deny to minority voters a reasonable opportunity to influence the outcome of electoral contests. On the other hand, the standard would be stringent enough to limit successful litigation to the small proportion of jurisdictions nationwide in which such denial of opportunity occurs. The objection to this sort of analysis, of course, is that what constitutes denial of reasonable opportunity is precisely what is at issue in the debate regarding intent and effect. My point, however, is not to indicate how this dilemma might be resolved, but to suggest that the House-passed version of Section 2 does not even address the dilemma. In short, the revised version of Section 2 gives no guidance to the courts with respect to the standards to apply to dilution cases. To be sure, the House Report, as I have noted, does discuss possible guidelines, but these are not set out in Section 2. If the revision of Section 2 is not intended to invalidate nationwide at-large elections in every city with a significant minority population, there is, nevertheless, nothing in the language of Section 2 to foreclose this development.

Even though I have argued here that the test of dilution prior to the Supreme Court's decision in Bolden combined elements of both effect and intent, one aspect of the Bolden litigation does lend support to the notion that the standard employed by the lower courts in Bolden was a pure effects test predicated on proportional representation. The remedy proffered by the lower courts in Bolden called for the replacement of Mobile's three-member commission with a mayor-council form of government, with nine councilors to be elected from single-member districts. Justice Blackmun, concurring in the Supreme Court's decision in Bolden, found the disestablishment of Mobile's city government to be an unwarranted exercise of judicial discretion--even though he believed that the at-large system was purposefully discriminatory. Justice Blackmun suggested several alternative remedies--among them at-large election with ward residency within the context of the existing commission plan--that stopped well short of the extreme remedy applied by the district and circuit courts. It is not altogether clear that Justice Blackmun's proposals would lead to the result desired by the lower courts in Bolden, that result apparently being representation of blacks on council in proportion to their number in the population. The logic of disestablishment, in other words, can be understood only in terms of porportional representation.

To the extent that conceivable remedies help to determine the definition of discrimination, the disestablishment remedy constitutes the most radical of effects tests. Stated differently, a challenge to an at-large system, of necessity, must be predicated on a comparison between electoral opportunity under the existing plan and the opportunity that would or might prevail under one or more alternatives. If the alternatives need not be limited to those that fit within the existing structure of government or the current size of the local governing body, then there is little to prevent the consideration of porportional representation as the model against which the current system would be evaluated. According to this same line of reasoning, even ward electoral plans might be subject to challenge if the number of wards (that is, the number of seats on the governing body) were too small to permit a racial or language minority from controlling at least one district.

The House Report is silent on the implications of the far-reaching remedy offered by the lower courts in Bolden. Thus, it is not clear to what extent the revised language of Section 2 would confer on courts the enormous discretion exercised by the lower courts in Bolden. This fact, combined with the ambiguity of Section 2 with regard to the standard for assessing dilution claims, leaves the revised provision subject to virtually any interpretation from the courts--including the view that Section 2 imposes a standard of proportion representation on state and local governing bodies.

I hope that these brief comments are of some value to the Subcommittee. Thank you for the opportunity to present them.

Sincerely yours,

Timothy G. O'Rourke

Timothy G. O'Rourke
Research Associate and
Assistant Professor

TGO'R:acg
Enclosure

PREPARED STATEMENT OF SAM J. ERVIN, JR.

THE TRUTH RESPECTING THE HIGHLY PRAISED AND CONSTITUTIONALLY DEVIOUS VOTING RIGHTS ACT

(Statement of Sam J. Ervin, Jr. of Morganton, N. C., a former Justice of the North Carolina Supreme Court and a former United States Senator from North Carolina. July 1981)

The Voting Rights Act

Mark Twain is reputed to have expressed this admonition: Truth is precious, use it sparingly. I will ignore the admonition, and tell the truth concerning the highly praised and constitutionally devious Voting Rights Act.

The Voting Rights Act was enacted by Congress in 1965 as legislation it deemed appropriate to enforce the Fifteenth Amendment. Subsequent to 1965, Congress amended the Act in comparatively minor respects and continued it in force. It is scheduled to expire soon, however, unless Congress extends it again. Hence, the current clamor in some quarters for its extension.

I will endeavor to explain in simple language why the Voting Rights Act, which applies primarily to six Southern states in their entirety, and to 40 counties in a seventh Southern state, is repugnant to the system of government the Constitution was ordained to establish. The major provisions of the Act were originally embodied in Public Law 89-110 and are now codified in sections 1973b, 1973c, 1973e and 1973l of Title 42 of the United States Code

In explaining the Act, I will hold to a minimum the multitude of judicial decisions which corroborate what I say in respect to the constitutional provisions and principles I cite.

The Constitution

As William Ewart Gladstone, the British statesman, affirmed, the Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man. It delegates to the federal government enumerated powers to enable it to act as the national government for all the states and all the people. It confers upon the states or reserves to them or the people all other powers. It undertakes to ensure liberty by forbidding governmental tyranny.

The Constitution consists of words inscribed on paper. If it is to be an effective instrument of government instead of a worthless scrap of paper, two things are indispensable. The provisions of the Constitution must be permanent in meaning until they are changed by a duly adopted amendment, and the words of the Constitution must be interpreted and applied to mean what they say. (Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60; Gibbons v. Ogden, 9 Wheat 1, 6 L.Ed. 23.)

The great and wise men who framed and ratified the Constitution knew this to be true. In consequence, they inserted in Article VI, clause 3 of the Constitution this specific provision: "The Senators and Representatives * * * and the members of the several state legislatures, and all executive and judicial officers both of the United States and of the several states, shall be bound by oath or affirmation to support this Constitution."

Chief Justice John Marshall, America's greatest jurist of all time, rightly ruled in Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60, that a Supreme Court Justice who does not conform his official action to the Constitution makes his oath to support it worse than a solemn mockery.

Before discussing the repugnancy of the Voting Rights Act to the Constitution, I deem it appropriate to make observations respecting other relevant matters.

The Thirteenth, Fourteenth, and Fifteenth Amendments

After it ratified the Thirteenth Amendment, which prohibits slavery, i.e., the forced labor of one man for another against his will, the nation undertook to confer upon the recently emancipated blacks equality of legal rights with white people. To this end, Congress enacted the Civil Rights Act of 1866, which specifies, in essence, that they are entitled to enjoy virtually the same rights as those enjoyed by white people under state laws.

Knowledgable constitutional scholars doubted whether the Thirteenth Amendment sufficed to vest in Congress power to enact the Civil Rights Act. To remove this doubt and the possibility that a subsequent Congress might repeal it, the nation added to the Constitution the Fourteenth Amendment, which includes the equal protection clause. This clause undoubtedly gave the blacks legal equality with white people under state law by decreeing, in substance, that state laws must treat in like manner all persons in like circumstances. Subsequent decisions of the Supreme Court adjudged that the due process clause of the Fifth Amendment imposes a similar requirement on acts of Congress.

The Fourteenth Amendment also made the recently emanicipated blacks citizens by providing that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

To make secure to blacks possessing the qualifications prescribed by law the right to vote, the nation added to the Constitution the Fifteenth Amendment which specifies that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or any state on account of race, color, or previous condition of servitude," and which confers on Congress the power to enforce that declaration by appropriate legislation.

The Supreme Court had these constitutional and legislative actions in mind when it made this comment in the Civil Rights Cases of 1883, 109 U.S. 3, 27 L.Ed. 835: "When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of mere citizen, and ceases to be a special favorite of the laws, and when his rights, as a citizen or a man, are to be protected in the ordinary modes by which other men's rights are protected."

Objective of Advocates of Voting Rights Act

The Voting Rights Act was the brainchild of impatient and zealous men who spurned this comment. They were bent on abolishing literacy tests in Southern States employing them as qualifications for voting, and thus securing to blacks residing in those states the power to vote irrespective of their ability to read and write, anything in the Constitution to the contrary notwithstanding.

To be sure, these impatient and zealous men professed that they merely desired to prevent these Southern States denying of abridging the rights of blacks residing in them to vote on account of their race or color.

If this had been their objective, there would have been no reason for them to persuade Congress to enact the Voting Rights Act.

Other Federal Laws

This is true because at the time of its enactment the United States Code was replete with federal statutes sufficient to prevent and punish any denial or abridgement by any of these Southern States of the right of any literate black to vote on account of his race or color.

Some of these statutes provided for the imposition of criminal penalties upon offending state or local officers. Others subjected them to liability for civil damages to the aggrieved persons. And others authorized the Department of Justice and aggrieved individuals or groups to prosecute equitable proceedings triable by federal judges sitting without juries, and to obtain in such proceedings judicial decrees compelling recalcitrant states and their officers under threat of punishment for contempt to register literate blacks and permit them to vote.

By means of these equitable proceedings, the Department of Justice or aggrieved individuals or groups could have obtained judicial decrees securing to literate blacks residing in recalcitrant areas in Southern States or subdivisions of Southern States the right to vote. They could have accomplished this purpose with dispatch because federal district judges sitting without juries or special masters appointed by them could have administered literacy tests to multitudes of blacks speedily either singly or en masse, and thereby established in short order the facts necessary to support decrees enforcing the rights of literate blacks to vote.

To be sure, the criminal prosecutions, civil actions, and equitable proceedings authorized by the federal statutes were triable in federal district courts in accordance with procedures and rules of evidence conforming to constitutional principles governing the administration of civil and criminal justice. Hence, it was incumbent upon the Department of Justice or the aggrieved individuals or groups to establish in them by credible evidence the literacy of blacks allegedly denied the right to vote in violation of the Fifteenth Amendment.

Reluctance of Advocates of Voting Rights Act To Invoke Other Federal Laws

For these reasons, politically-minded Attorneys General and advocates of the Voting Rights Act were reluctant to invoke these federal laws. They found it more profitable politically to agitate for the enactment of the Voting Rights Act before the nation-wide news media and in Congress than to assume the burden of establishing the truth of their allegations against the South by constitutional procedures and rules in the judicial calm of courts of justice. Besides, advocates of the Voting Rights Act also found it financially profitable to agitate in this manner because the agitation induced benevolently-minded citizens to make contributions to the causes they espoused.

I interrogated all of the occupants of the office of Attorney General during my 20 years in the Senate in various hearings concerning the reluctance of the Department of Justice to invoke existing federal statutes to enforce the Fifteenth Amendment. They invariably gave excuses rather than justifications for the Department's reluctance. They confessed that the Department had not sought criminal prosecutions of any Southern State or local officer for allegedly denying literate blacks the right to vote during their tenures. They explained the Department's inaction in this respect by asserting that southern juries would not convict state or local officers in such prosecutions.

Since the Department of Justice had not instituted any criminal prosecutions of this nature against Southern State or local officers during their tenures, their assertion was simply an unsupported attack upon the integrity of Southern people.

I suggested that they harbored prejudices against Southerners akin to those they professed to be desirous of eradicating from Southern minds, and reminded them that the equitable proceedings authorized by existing federal laws were triable by federal district judges without Southern juries. They then asserted that the statutes authorizing civil actions and equitable proceedings were substantially ineffective -- an assertion which my long experience as a trial lawyer and trial and appellate judge disabled me to accept. I was convinced that a competent lawyer could have obtained a decree in an authorized equitable proceeding securing the right to vote to any literate black.

The assertion of the Attorneys General to the contrary was disproved in a number of equitable proceedings which the Department of Justice prosecuted to successful conclusion in recalcitrant areas in Alabama, Louisiana, and Mississippi.

Illiteracy

I digress to observe that although it is undoubtedly more prevalent in the South than it is in other regions, illiteracy is not exclusively a Southern problem, or exclusively the product of Southern discrimination against blacks in education.

The validity of this observation was revealed in a Senate hearing.

Attorney General Robert F. Kennedy twitted me with the fact that the census of 1960 disclosed that my home State, North Carolina, numbered about 30 thousand illiterate blacks among the people inhabiting it. He charged that this fact, standing alone, conclusively proved that North Carolina discriminated against blacks in education.

I thereupon scrutinized the census of 1960 for myself, and discovered to my surprise and to Attorney General Kennedy's consternation that it revealed that his home state, Massachusetts, was the domicile of about 60 thousand illiterate whites. I hastened to assure Kennedy that I did not accept this fact as proof that Massachusetts discriminated against whites in education.

I also digress to express my abiding conviction that it is reprehensible for any state, or any public officer, wilfully to deny or abridge the right of any qualified person of any race to vote for any reason.

The Voting Rights Act Is A Bill Of Attainder

Article I, Section IX, Clause 3 of the Constitution expressly forbids Congress to practice what may well be described as the most contemptible of all tyrannies. It forbids Congress to pass any bill of attainder.

A bill of attainder is a legislative act which declares a person guilty of a past offense and inflicts punishment upon him for it without a judicial trial.

To constitute a bill of attainder under Article I, Section IX, clause 3 of the Constitution, an act of Congress must have these characteristics: (1) It must apply either to named persons or to a class or group of ascertainable persons; (2) it must declare by legislative fiat that the named persons or the class or group of ascertainable persons are guilty of a past offense; and (3) it must inflict punishment on the persons named or the class or group of ascertainable persons for the offense without a judicial trial.

The Supreme Court has adjudged that various classes or groups, such as persons who supported the Confederacy during the Civil War, or members of the Communist Party, constitute ascertainable persons within the purview of bills of attainder. These adjudications compel the conclusion that legislators, executive officers, or citizens of a particular state are ascertainable persons within the purview of bills of attainder.

The punishment inflicted by a bill of attainder need not be a fine, or imprisonment, or a death sentence. It may consist of the denial of the right to engage in a profession, trade, or business, or the deprivation or suspension of constitutional, political, or legal powers and rights.

The Voting Rights Act is clearly a bill of attainder. It applies to the states and subdivisions of states it covers, and to ascertainable classes or groups of their officers and citizens; it declares them guilty of past offenses, i.e., denying or abridging the rights of black citizens to vote in violation of the Fifteenth Amendment; and it punishes them for the alleged past offenses by the deprivation or suspension of various constitutional and political powers vested in them by the Constitution.

Literacy Tests As Qualifications For Voting

The Constitution provides that electors of the United States House of Representatives "in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature" (Article I, Section II); that the presidential and vice presidential electors of each State shall be appointed "in such manner as the legislature thereof may direct" (Article II, Section II, Clause 3); and that the electors of United States Senators "in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature" (Seventeenth Amendment).

The Tenth Amendment reserves to the States the power to prescribe the qualifications for voting in state and local elections.

As the Supreme Court and State and inferior federal courts have rightly adjudged in cases past numbering, these four constitutional provisions empower a State to establish and employ literacy tests as qualifications for voting in all Federal, State and local elections within its borders.

The power of a State to prescribe qualifications for voting in all elections is subject to five narrow limitations specified by the Constitution itself. A State cannot make race (Fifteenth Amendment), sex (Nineteenth Amendment), the age of persons eighteen years or over (Twenty Sixth Amendment), or the payment of a poll or other tax (Twenty Fourth Amendment) a qualification for voting. Moreover, qualifications for voting established and employed by a State must apply in like manner to all persons of all races similarly situated (Equal Protection Clause of the Fourteenth Amendment).

Indispensable Constitutional Principles

The Constitution establishes certain fundamental principles which must control the official actions of Congress, the President and the Supreme Court if the United States is to endure as a federal system of government, and the United States, the States, and the people are to be ruled by the Constitution and equal, impartial, and uniform laws conforming to that instrument. Insofar as they are presently germane, these principles are as follows:

1. As the Supreme Court so well declares in Texas v. White, 67 Wall. 700, 19 L.Ed. 227, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

2. To this end, our system of government is based on dual sovereignties, state and federal, each of which is supreme within its own sphere. Under it, the States possess all the attributes of sovereignty, except as to the powers granted to the federal government by the Constitution, or denied to the States by that instrument. (72 Am. Jur. 2d, States, Territories, and Dependencies, Section 16)

3. The Constitution consists of harmonious provisions of equal dignity. None of them may be so interpreted, applied, or enforced as to nullify or suspend any others.

4. Neither the Congress nor the President nor the Supreme Court has power to nullify or suspend any provision of the Constitution. As the Supreme Court rightly ruled in its most courageous and intelligent decision of all time, Ex Parte Milligan, 4 Wall 2, 18 L.Ed. 281, "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

5. Under the Constitution, the United States is a union of political equals, and all the States stand on an equal footing in respect to the constitutional powers they possess. As the Supreme Court rightly adjudged in Coyle v. Smith, 221 U.S. 559, 55 L.Ed. 853, "The constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."

6. The Fifth and Sixth Amendments **as well** as Articles I and III of the Constitution plainly forbid the federal government to punish any person for any offense unless his guilt is established in a fair trial in a court of justice.

7. The Constitution and federal statutes conforming to it establish appropriate sactions to remedy or punish state or local legislative or administrative action which denies or abridges the right of United States citizens to vote on account of race or color. If the action is based on state law, the law is void, and the judiciary is empowered by Article III and the Supremacy Clause of the Constitution to so adjudge and restrain its execution. If the action is based on misconduct of state or local officials, the judiciary is empowered by federal statutes to punish or restrain the misconduct, and to enforce the right to vote by suitable rulings. The Constitution clearly forbids the Congress, the President, or the federal judiciary to undertake to remedy or punish it by nullifying or suspending the power vested by it in state of local officials to establish and employ literacy tests as qualifications for voting.

The Voting Rights Act treats with contempt all of these fundamental and indispensable constitutional principles.

The Artificial Formula of the Voting Rights Act

The advocates of the Voting Rights Act were pragmatic politicians. As such, they knew that they could not induce Congress to approve its drastic provisions unless the legislation embodying them plainly exempted from its coverage virtually all sections of the nation outside the areas of the South targeted by them.

Hence, they cleverly contrived an artificial legal formula to trigger the Voting Rights Act into automatic operation without a judicial trial in the areas of the South targeted by them, and to exclude from its coverage virtually all areas of the nation outside the targeted areas.

They were able to do this by differences in voting patterns in the South and other sections. At the time of the passage of the Voting Rights Act, the Democratic Party dominated the South, while the Democratic and Republican parties had substantially equal strength in virtually all other sections. Hence, there was low registering and voting in presidential elections in the South because all federal officers except the President and all state and local officers were chosen for all practical purposes in primaries and the ultimate choice of the presidential candidate was a foregone conclusion; whereas there was high registering and voting in presidential elections in other sections of the nation because the choice of their voters for President as well as for other federal and state and local officers were determined in them.

For this reason, the advocates of the Voting Rights Act devised the artificial formula embodied in Section 1973b(b) of Title 42 of the United States Code which automatically applies the major provisions of the Act to the areas in the South targeted by them and excludes virtually all other sections of the land from them.

The provisions creating the artificial formula specify that the Voting Rights Act automatically applies in any State or in any subdivision of a State (1) which the Attorney General determines employed a literacy test as a qualification for voting on November 1, 1964, and with respect to which (2) the Director of the Census determines that less than 50 percent of the persons of voting age residing in it were registered on November 1, 1964, or less than 50 percent of such persons voted in the presidential election of 1964.

These determinations are made by the Attorney General and the Director of the Census without a hearing, and are not subject to review in any court of justice. Moreover, they totally ignore the race of the persons of voting age who were registered on November 1, 1964, and the race of the persons of voting age who voted in the presidential election of 1964. As a consequence, the formula applies to any State or subdivision of any State embraced within the determinations if less than 50 percent of the persons of voting age of all races residing in it were registered on November 1, 1964, or voted in the presidential election of November, 1964, even though all its black residents of voting age were registered at the specified time and all of them voted in the specified presidential election.

Nevertheless, the formula creates, in substance, a conclusive presumption that States or subdivisions of States embraced within the determinations denied or abridged the right of black citizens to vote on account of race or color in violation of the Fifteenth Amendment; and on that basis alone punishes such States and subdivision of States and their officers and citizens by the deprivation or suspension of the constitutional powers and rights previously enumerated in the manner hereafter stated.

Unconstitutionality of Formula

The formula created by the Voting Rights Act is unconstitutional as well as artificial. It violates the due process clause of the Fifth Amendment in two ways. First, the Act creates a conclusive presumption; and second, the factual determinations of the Attorney General and the Director of the Census have no rational connection with the ultimate fact presumed, i.e., that the States or subdivisions of States embraced within the determinations denied the rights of black citizens to vote on account of race or color in violation of the Fifteenth Amendment.

Constitutional Infirmities of the Voting Rights Act

As originally enacted in 1965, the Voting Rights Act condemns the areas in the South targeted by it, namely, the entire States of Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, and 40 of North Carolina's 100 counties. At the same time the Act repudiates the doctrine of the constitutional equality of the States by exempting from its crucial provisions the 21 other States employing literacy tests as qualifications for voting in their entirety with the exception of the State of Alaska and about five counties in three other States. Alaska and these five counties were impaled by the formula, notwithstanding few blacks, if any, resided in them, and they had never violated the Fifteenth Amendment as to any of them.

When it subsequently amended the Act by extending its coverage on the basis of registration and voting in the presidential election of 1968, Congress continued in force the Act's original condemnation and punishment of the six Southern States and the 40 North Carolina counties. This amendment may have ensnared a few isolated counties in Northern or Western States, which, like Alaska and the five counties previously condemned, had few black residents, if any, and had never violated the Fifteenth Amendment as to any of them.

For reasons already detailed, the Voting Rights Act treats with contempt the constitutional prohibition of congressional bills of attainder, the due process clause of the Fifth Amendment, and the doctrine of the constitutional equality of the States. In addition, the Act is repugnant to the other fundamental and indispensable constitutional principles which have been previously enumerated.

The provisions of the Act, now codified as Section 1973b(a) is based on the unconstitutional assumption that the Fifteenth Amendment takes precedence over the four provisions of the Constitution plainly vesting in the States the power to employ literacy tests as qualifications for voting, and empowers Congress, a creature of the Constitution, to nullify or suspend these four provisions by an irrefutable bill of attainder. On the basis of this unconstitutional assumption, the Voting Rights Act punishes any State or subdivision condemned by its forumula by the deprivation or suspension of its constitutional power to employ literacy tests as qualifications for voting, and decrees that such deprivation or suspension remains in effect until a specific federal court, i.e., the District Court of the District of Columbia, "in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that" no literacy test "has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color."

The Supreme Court ruled in Gaston County v. United States, 395 U.S. 285, 23 L.Ed.2d 309, that a state or subdivision condemned by the formula of the Voting Rights Act has the burden of proving in an action for a declaratory judgment under Section 1973b(a) that it has not violated that section during the prescribed period. The same decision makes it virtually impossible for a condemned Southern State or subdivision to carry this burden of proof successfully by concluding that such State or subdivision produced the illiteracy of its black citizens by prior discrimination against them in education.

The provision of the Voting Rights Act now codified as Section 1973c suspends the power of any State or political subdivision condemned by the formula to exercise its power under the Constitution of the United States or its own Constitution to make any change in its voting laws in effect on November 1, 1968, without securing in advance either (1) a ruling of the United States District Court of the District of Columbia in an action brought by it against the United States for a declaratory judgment, or (2) a ruling of the Attorney General, that the change "will not have the effect of denying or abridging the right to vote on account of race or color." This provision of the Voting Rights Act robs a condemned State or subdivision of the power to legislate in an area vital to its practical operation without the prior approval of the United States District Court of the District of Columbia or that of the Attorney General.

Even apart from the constitutional evil it does, the Voting Rights Act is grossly unfair to many of the areas of the South it condemns. While the officers in some of these areas discriminated against blacks in voting, the officers in many others administered literacy tests with impartiality as required by the Fifteenth Amendment. The Voting Rights Act condemns the recalcitrant and law-abiding States and officers in like manner, and inflicts identical punishment upon them and the areas for which they act.

The Voting Rights Act, I submit, is subject to a constitutional informity additional to those already discussed.

The Act denies each condemned State or subdivision access to any court to contest the constitutionality of its original condemnation and punishment. It vests exclusive jurisdiction of subsequent actions for declaratory decrees under Sections 1973b(a) and 1973c of Title 42 of the United States Code in the United States District Court for the District of Columbia, a court sitting in Washington, D. C., 200 miles from the capital of the nearest condemned Southern State and 1000 miles or more from some of the others. (42 U.S.C. 1973b(b)) As a consequence, a State or subdivision condemned by the Act has the herculean, if not the impossible task and expense, of presenting its case to this court by securing the appearance of witnesses essential to its exoneration at hearings conducted hundreds of miles from their places of abode. The task is aggravated by the provision of 42 U.S.C. Sec. 1973(l)(d) which denies the condemned State or subdivision subpoenas to compel the attendance of any witnesses residing more than 100 miles from Washington without the consent of the court.

I submit that the venue and rules established by the Voting Rights Act in actions for declaratory judgments under Sections 1973b(a) and 1973c deny the condemned State or subdivision a fair trial, and for that reason offend the due process clause of the Fifth Amendment, which mandates that all trials in federal district courts must be fair.

They undoubtedly disgrace the Congress of a nation whose Declaration of Independence assigned as one of the reasons for the severance of its political bonds to England that King George transported Americans "beyond seas" to try to them "for pretended offences."

The Voting Rights Act and the Supreme Court

Chief Justice Harlan F. Stone declared that "where the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action, and fearless comment upon it."

Despite its manifold arbitrary provisions and constitutional infirmities, the Supreme Court ruled in South Carolina v. Katzenbach, 383 U.S. 301, 15 L.Ed.2d 769, that the Voting Rights Act constitutes appropriate legislation to enforce the Fifteenth Amendment within the purview of its second section.

I have carefully scrutinized that ruling on many occasions, and will make some fearless and truthful comments upon it. The decision in South Carolina v. Katzenbach is as bizarre as the Voting Rights Act itself.

In the opinion underlying the decision, the Supreme Court rejects all the constitutional complaints against the Voting Rights Act by assertions which are neither constitutionally permissible nor intellectually satisfying. The assertions are quite intriguing.

The Supreme Court conceded, in essence, that the Voting Rights Act is a bill of attainder and violates the due process clause. It asserts, however, that this fact is wholly immaterial. The immateriality, the Supreme Court says, arises out of the circumstance that States of the Union are not persons in the context of the prohibition of congressional bills of attainder under Article I, Section IX, Clause 3 of the Constitution, or the due process clause of the Fifth Amendment. (383 U.S. 301, 323-324, 15 L.Ed.2d 769, 784)

Diligent research reveals no authoritative precedent supporting this assertion. To be sure, there are some cases in which courts have made careless statements that states are not persons. These are cases in which the courts were construing laws imposing liabilities and conferring legal rights on individuals and organizations under the designation of "persons" and they were merely adjudging in them that the laws did not apply to States.

The Supreme Court's assertion of the inapplicability of the constitutional prohibition of congressional bills of attainder and the due process clause to the Voting Rights Act is something which Alice In Wonderland would have described as an impossible and unbelievable thing. This is so because if it were sound law instead of a judicial aberration, it would mean that Congress, a creature of the Constitution, has the arbitrary and autocratic power under the Constitution to destroy the federal system of government ordained by the Constitution by nullifying or suspending governmental powers conferred upon, or reserved to, the States as indestructible members of an indestructible union by the Constitution without notice, hearing, or proof by passing irrefutable bills of attainder alleging that the States had been guilty of wrong-doing in exercising their governmental powers. Every syllable in the Constitution refutes this fantasy.

The assertion is incompatible with sound Supreme Court decisions defining and explaining what States are in a constitutional sense, and the plain language in which the constitutional prohibition of congressional bills of attainder and the due process clause are expressed.

Since it handed down its decision in Chisholm v. Georgia, 2 Dall. 419, 1 L.Ed. 440, in 1792, the Supreme Court has consisently and rightly held that a State is an artificial or corporate person which has the capacity to sue to vindicate its constitutional powers or protect its proprietary interests.

Other Supreme Court decisions consistently and rightly hold that a State is far more than a mere geographical spot on the nation's map. They adjudge that a State is a political community of free citizens; that it is composed of the people residing within its borders; that in the nature of things it necessarily acts through legislative, executive, and judicial officers, who are natural persons; and that it acts through such officers to exercise the governmental powers which it and its citizens, who are natural persons, possess in their sovereign, corporate, and collective capacities.

Article I, Section IX, Clause 3 of the Constitution declares in plain words that "no bill of attainder * * * shall be passed", and the Fifth Amendment decrees in plain words that "no person * * * shall be deprived of life, liberty, or property without due process of law."

These provisions are absolute, and subject to no exceptions. Since they have no power to amend or distort them while professing to construe them, Supreme Court Justices cannot adjudge that they do not extend their protections to States, or subdivisions of States, or their officers or citizens without converting their oaths to support the Constitution in Chief Justice Marshall's unhappy phrase into worse than solemn mockeries. And that is exactly what they did in South Carolina v. Katzenbach.

The Supreme Court declares in South Carolina v. Katzenbach that a State has no standing as a parent of its citizens to invoke the constitutional prohibition of congressional bills of attainder or the due process clause. What relevancy this declaration had I cannot imagine. South Carolina was not suing as the parent of its citizens. It was suing in its own right to protect its own constitutional powers against congressional nullification or suspension, and to protect its own right to exercise those powers in the only way it could, i.e., through its officers.

To circumvent the invalidation of the Voting Rights Act by the doctrine of the constitutional equality of the States, the Supreme Court assigns to this doctrine in South Carolina v. Katzenbach a new meaning, which is alien to the objective of the doctrine and makes it virtually impotent as a protection to States. In so doing, the Supreme Court declares that the doctrine protects a State only at the precise moment of its admission to statehood, and that thereafter Congress can reduce it to the status of a second class State with constitutional powers inferior to those of other States by passing a bill of attainder. (383 U.S. 301, 328-329, 15 L.Ed.2d 769, 787)

The assertions which the Supreme Court makes to avoid invalidating the Voting Rights Act under the due process clause of the Fifth Amendment are also intriguing, but constitutionally impermissible and intellectually unsatisfying. They are, in substance, that the due process clause permits Congress to create conclusive and irrational presumptions in all its enactments except those relating directly to criminal prosecutions (383 U.S. 301, 328-329, 330-331, 15 L. Ed.2d 769, 788), and that the constitutional objections to the jurisdiction the Act vests in the United States District Court for the District of Columbia is without substance because Article III, Section 1 of the Constitution empowers Congress to establish inferior federal courts and to define or limit their jurisdiction (383 U.S. 301, 331, 15 L.Ed.2d 769, 788-789). This constitutional provision does confer upon Congress power to create inferior federal courts and to define or limit their jurisdiction, but it does not authorize Congress to limit the jurisdiction of such courts or to prescribe precedures or rules of evidence which limit their exercise of such jurisdiction in ways which deny litigants a fair trial as guaranteed by the due process clause.

As interpreted and applied in Gaston County v. United States, the Voting Rights Act condemns a State of wrongdoing by a conclusive, irrational and unconstitutional presumption, and on that basis robs the State of its constitutional powers, and simultaneously establishes a rule of evidence which precludes it from afterwards resuming its constitutional powers unless it rebuts the conclusive, irrational, and unconstitutional presumption.

Summation

The Voting Rights Act and South Carolina v. Katzenbach treat with contempt the undeniable truth that apart from the faithful observation of the Constitution by Congress, the President, and the Supreme Court, America has no protection against anarchy, and Americans have no protection against tyranny.

What has been said proves that the Voting Rights Act commits these linguistic mayhems on the Constitution:

1. It robs the States its irrational formula condemns of constitutional powers it permits their sister States to retain and exercise.

2. It robs the States its irrational formula condemns, and their citizens of essential protections which the Constitution makes inviolate when they are invoked by others, including those who commit treason against the United States, and those who seek to destroy the United States by violence or other unlawful means.

3. It robs the States condemned by its irrational formula of sovereignity essential to their proper functioning under the Constitution.

What has been said also reveals that the decision in South Carolina v. Katzenbach is repugnant to multitudes of sound Supreme Court decisions. Notable among them are the cases I have cited and the additional unanswerable ruling in Ashton v. Cameron County Water Improvement District, 298 U.S. 513, 531, 80 L.Ed. 1309, 1314.

The Voting Rights Act was not necessary to punish violators of the Fifteenth Amendment, or to secure to any qualified black the right to vote in any area of the nation. Other federal laws conforming to the Constitution were adequate to accomplish these beneficent purposes.

As the Supreme Court has rightly adjudged, a literacy test meeting constitutional limitations affords a State constitutional means for securing an informed electorate. (Lassiter v. Northampton County Board of Elections, 360 U.S. 45, 3 L.Ed.2d 1072)

Americans who cherish the belief that illiterate persons ought to be allowed to vote have a constitutional and intellectually honest way to seek the consummation of their belief. They may advocate a constitutional amendment to outlaw literacy tests.

Instead of doing this, advocates of the Voting Rights Act sought to nullify the use of literacy tests in the States targeted by them by suspending powers plainly secured to those States by the Constitution, and by converting them from indestructible members of an indestructible Union and their officers and citizens from free persons to constitutional and legal pariahs.

I do not condemn advocates of the Voting Rights Act who are justifiably ignorant of the Constitution. But I can find nothing to say in extenuation of the action of supporters of the Act who are either contemptuous of its impact upon constitutional principles and protections, or are too lazy to ascertain what its impact on such principles and protections is.

I cannot accept as a justification for the Act the claim of its advocates that it has secured the power to vote to untold thousands of blacks in the Southern States impaneled by its irrational formula. Constitutional evil cannot be condoned because those responsible for it are actuated by motives they deem righteous.

The Act has undoubtedly secured the power to vote to many illiterate blacks. The claim of its advocates that it has also secured the power to vote to all the literate blacks registered in the condemned States after its enactment is certainly overbroad and insupportable. Most of them would have been registered in the absence of the Act because discrimination against literate blacks in voting has been virtually abandoned in Georgia, North Carolina, South Carolina, and Virginia, and has substantially decreased in Alabama, Louisiana, and Mississippi.

When one seeks an explanation for the enactment of the Voting Rights Act and the adjudication that it is a constitutionally appropriate means for the enforcement of the Fifteenth Amendment, he is compelled by intellectual integrity to reach this sad conclusion: Congress enacted the Voting Rights Act and the Supreme Court approved its action because they were determined to arrogate to themselves the arbitrary and autocratic power to secure to blacks residing in the States condemned by the irrational formula the power to vote irrespective of their ability to read or write, all the provisions and principles of the Constitution to the contrary notwithstanding.

The Voting Rights Act evokes the recollection of a relevant comment Pope Julius III made to a Portugese Monk centuries ago. The Pope said: "Learn, my son, with how little wisdom the world is governed."

Congress will allow the Act to expire unless a majority of its members wish to demonstrate that their oaths to support the Constitution are worse than solemn mockeries.

REMARKS OF RANDALL T. BELL

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"The Voting Rights Act and Reapportionment: Should Section 5 Be Extended?"

MR. BELL: Laughlin's argument reminds me of a definition of politics that I once heard. Someone said that politics is the art of looking for trouble, finding it everywhere, diagnosing it incorrectly and coming up with the wrong remedy.

Section 5 clearly should not be extended. I think there are three major reasons why that is so. First, it does not really promote minority participation in the political process. Secondly, it offends two very basic principles of our political tradition: federalism and popular self-government. Finally, it is being used for a purpose never intended by Congress in 1965, that is, to restructure state and local governments on the theory of "proportional representation." Let me address each of those points for a moment.

As Laughlin stated, Section 5 has been called the single most effective piece of civil rights legislation in our history. Let me make it clear that we are not debating the right to vote. We are not defending the exclusion of anyone from that privilege or the privilege to run as a candidate or be a full participant in the political processes in this county. That is what American Democracy is about. That is not the argument. The question is whether Section 5 should be extended. The simple fact is that Section 5 has had nothing to do with securing the participation of minorities in electoral politics. It is true that there has been a radical change in the participation of minorities in the political process in the South. No one denies that. However, if you look at the facts and figures you see it has nothing to do with Section 5 preclearance. The belief that Section 5 has been a uniquely effective means of securing minority voting rights is simply part of the unexamined mythology of contemporary politics.

It is generally agreed by people knowledgeable in political science that the most reliable index of political participation is voter registration. There is no question that before the Voting Rights Act was passed the level of black voter registration in the covered jurisdictions was half, and in many times, less than half of that in the rest of the country. In the South in 1964 it ranged from a low of around 7% in Mississippi -- that is 7% of the voting age black population -- to somewhere around 40% in some of the border states. This was compared to 65 to 75% registration in the rest of the country. In the years immediately after Section 5 was passed, black voter registration shot up dramatically in the South and it is not only comparable to the rest of the country now, but ahead of most other sections of the country today. Therefore, Section 5 protects voting rights, right? Wrong. Let's look at the record in a little bit more detail.

Let's take Mississippi, which was always the classic bad boy when it came to voting rights. Between 1965 and 1968, the first three years after the Voting Rights Act was passed, black voter registration went from that low of 7% to a high of 71% in Mississippi. What was happening under Section 5 during that same time period? Mississippi made no submissions under Section 5. Not a single Section 5 objection was entered by the Justice Department. In South Carolina, my own state, there were over 354 submissions made. We were the only state that obeyed the Voting Rights Act from the beginning. We have always submitted our voting changes. We sent in 354 changes between 1965 and 1971. Out of those 354 submissions, there were zero objections. The Justice Department found none of these changes discriminatory. Our black voter registration went from 37% of the eligible population to 60% in that time period, almost doubled.

Now Mr. McDonald will no doubt say, "That argues my case for me. That shows how successful preclearance is, because people wised up. All of those bad old southern racist voting registrars down there knew that they could not get away with it. If you have zero objections, that means that the Act is working and we should continue with it."

Let's look again. Take North Carolina and let's get a control group into the experiment. North Carolina, as Cleata has already told you, has some counties that are covered and some that weren't covered and never have been covered by Section 5. In the Section 5 covered jurisdictions in 1974, ten years after the Act, 51% of the eligible blacks were registered. How about the uncovered jurisdictions? Without the benefit of Section 5 they were way back in the past weren't they? Fortunately for black voters, but unfortunately for the myth of Section 5 effectiveness the voter registration among blacks in noncovered counties was higher than in the covered counties -- 59%, almost ten percentage points higher.

Let's take Texas. Every lawyer who knows anything about the history of voting discrimination knows all of the cases that came out of Texas: the all-white primary; the Jaybird Party; all of those taxes to keep blacks away from the polls, and so forth. Texas' record is very comparable to the rest of the old South in terms of depriving blacks of the right to vote. But Texas was not covered by Section 5 during the first ten years of the Act. From 1964 to 1975, black voting registration in Texas rose dramatically as it did in the rest of the South. It was 35% at the beginning of that period, which was about the average for the states of the Old Confederacy. In 1975 before they became under Section 5, it was up to 62%. The same dramatic increase in the black voting participation which took place throughout the South also took place in Texas which was not even covered by Section 5.

The experience in North Carolina and Texas strongly suggests that Section 5 has nothing to do with the fact that blacks are being brought into the main stream of politics in the South and in the rest of the country. That is a phenomenon attributable to a whole range of complex social and political changes in our country. It has nothing to do with Section 5. The oft-repeated notion that without Section 5 we can't make any progress or would not have made any progress is just a myth.

The second objection to extending Section 5 is that it is inconsistent with fundamental principles in our constitutional system. I mentioned two: federalism and popular sovereignty. Section 5 says that the states and local cities, governments -- county governments, parish governments and so forth -- can't pass their own laws and put them into effect. The operation of those laws is suspended unless they are approved in Washington. Most of us have probably forgotten it, but we Americans had a previous experience with the suspension of local laws by the central government.

During the colonial period, the British crown claimed the power as part of the royal prerogative to suspend the operation of laws passed by colonial legislatures and local governments. Suspension of the laws was one of the main grievances of the Founding Fathers. I was reading the Declaration of Independence this week. It is good exercise to reread that document at times. One of the things they said about old King George when they put in the bill of particulars was this: "He has forbidden his governors to pass laws of immediate and impressing importance unless suspended in their operation 'til his consent shall be obtained." This is exactly what Section 5 does.

The same issue was debated in 1787 at the Constitutional Convention in Philadelphia. Pinckney of

South Carolina, supported by James Madison of Virginia, actually proposed that the national government have the power to suspend or "negative" state laws. The proposal was resoundingly defeated. John Lansing, of New York said: "Will a gentleman from Georgia be a judge of the expediency of the law to operate in New Hampshire." The same principle is now embodied in Section 5, something that was explicitly rejected as part fo our constitutional system by those wise men in 1787.

Why is suspension of locally enacted laws bad? Because it undercuts another basic notion which is even more important. That is the notion that we govern ourselves. It is no accident that President Carter used to call his campaign appearances "town meetings." He was appealing to something very deep in our democratic political tradition -- the principle of local self-government. Section 5 ignores that principle. Section 5 preclearance destroys local control of the means of self-government, the right of each community to determine its own course with respect to its election laws, its form of government, and all the other rights the Constitution has allocated to the people.

This is not just an abstract argument of Constitutional theory. Mr. McDonald was talking about Sumter County, Georgia. I want to talk about another Sumter County -- Sumter County, South Carolina in my home state. The county is 42% black. Race relations have been pretty good in that county over the past twenty years. Blacks have been elected at-large in that county to county-wide political offices. They hold judgeships. White voters have proved over again that they will support black candidates. When Sumter County decided to go to what is called "Home Rule" -- that is to go from an appointive system of county government to having the people elect their own county government -- it decided to have a seven-member council elected by the county at-large. That is a pattern that they have used for other governmental bodies and under which blacks have been elected in that county. The voters approved that decision in a referendum. The people of Sumter County, exercising this American right of popular sovereignty said, "This is the way that we want to structure our county government. They had to submit it to Washington under Section 5, because it was a change. The Justice Department objected. They said, "You can't do that. You are diluting the vote down there." No one in Washington ever explained how giving the people the right to vote for their county council took away the vote -- diluted it. But the fact is that as a result of the Section 5 objection the matter went to the federal court. Because of the lawsuit, they have had no election for county council in Sumter County for over six years. That is the way that Section 5 has "protected" the right of those people to vote.

Section 5 also offers no incentive for improvement. You can have a clean record. You can have done away with the literacy test and the citizenship test and having people swear that you have good character and all of these classic discriminatory devices. You can have abolished them a long time ago. You can demonstrate that everybody has fair access to the political process. Yet you can't get out from under Section 5 preclearance. To extend Section 5 takes away any incentive for covered jurisdictions to have a clean record. That does not protect anyone's voting rights.

Finally, I said that Section 5 is being used to impose a particular theory of representation on state and local governments. It is a theory favored by the Voting Section of the Justice Department even though it has been rejected by the United States Supreme Court. This again is not an abstraction.

There is a debate about what it means to have fair representation in this country. I am not going to take sides on that debate this afternoon. I think there are points on both sides. I think it is healthy that we are constantly reexamining what it means for everybody to have full and fair access to our political system. But one thing is very clear to anyone who looks at the record. The basic intention of Congress, the basic understanding, the basic arguments that were made in favor of Section 5 when it was first passed came down to one idea -- Section 5 was satisfied as long as voting procedures and voting qualifications presented no barrier to the citizen's right to cast his ballot, to register to vote, to be a candidate himself if he wanted to and to participate in the methods by which candidates are nominated. If you satisfied those criteria that you had passed the test of Section 5.

That is not the way that Section 5 has been applied. In by far the largest number of objections that are interposed by the Justice Department nowadays, it is conceded that none of those things are present and there is no racial discriminatory purpose in the change. But local laws are objected to because in the Justice Department's view they do not fit with its own theory of voting rights.

The Justice Department's theory is that Section 5 is not satisfied unless, to the maximal extent practical, the new election change guarantees the minority community the opportunity to achieve legislative representation roughly proportional to its percentage of the population. Mr. McDonald's argument is a classic example of this theory. He gave us all the percentages to show a disparity between the black population and black office holders.

We can have an interesting debate about the merits of proportional representation the next time we have this program. Personally, I believe the theory is nothing more than the old "separate-but-equal" doctrine applied to politics. Be that as it may, the Supreme Court has said that the Constitution does not embody that theory and that it should not be imposed by the federal government. But it is the policy of the Department of Justice to require proportional representation. The bureaucrats don't agree with the Court, so they ignore its opinions in administering Section 5. I will give an example of that.

Charleston County, South Carolina, has an at-large system of electing its nine-member county council. They have consistently, in a county that has a 25% black voting age population, elected two black members to that council voting at-large. White voters are willing to support black candidates. Black voters provide the margin of victory for all nine seats on that council.

The Justice Department objected to the way people in Charleston elect their county government because it was possible, by drawing some real funny lines to create three election districts in which there would be a black majority. The argument was made that the blacks who were on County Council were not the "right kind" of blacks and somehow the vote of blacks was being "diluted" because they could not vote for the "right kind" of blacks unless they were guaranteed black majority districts. Is it really the business of the Department of Justice to come into a place like Charleston County and impose a system of government that most of the local people don't want? How does that protect voting rights? Yet Section 5 is consistently being employed by the Justice Department to do just that. What a far cry from the original intention of Congress. It is this systematic abuse of power that leads me to say Section 5 should not be extended. We can protect the voting rights of all of our people in other ways without Section 5.

REBUTTAL

MR. BELL: I wish Laughlin had not mentioned Columbia, South Carolina. Columbia simply does not support his argument. Let me tell you a few things about Columbia. I live there and I follow with great interest what he has been talking about. I don't know which newspaper his quote came from but I have an idea. Those same white "racial bloc voters" he is talking about (the ones he claims defeated the referendum) have voted heavily in favor of black candidates for Richland County Council over the past six to eight years. I will name some names. Dr. A. T. Butler, who is a very distinguished black educator at one of the black colleges, presently an incumbent, has lead the ticket in the Democratic Primary with substantial white support. If you will look in the white wards, you will see he is pulling the votes. John Harper, a well-known Civil Rights activist (he has been called stronger terms than that at times) has been elected by these same white people. Julius Murray, now a member of our State Legislature from Richland County, also has served on the Richland County Council, with the support of the white voters.

If you will look at the City Wards and see the voting patterns, this white racial bloc vote simple is not there.

Now the unfortunate thing is that we have had two referendums on the issue of single member districts in Columbia. Laughlin didn't tell you that it was primarily the opposition of black voters that led to the rejection of a single member district plan in the first referendum. Unfortunately, it is the kind of arguments that Laughlin makes that turn these matters into racial issues. At-large voting, especially in municipal elections, was considered a "good government" reform for many years. It first came in the late nineteenth century and the early part of this century is part of the Progressive movement. That's the same movement that favored popular elections of United States Senators, the franchise for women, and so forth. It was an attempt, mostly in the larger northeastern cities, to break up the old ward system of politics which had led to corruption there. At-large voting has become a racial issue because people have tried to make it a racial issue in the South in modern times. I think it does no good to go back and resurrect the ghost of Pitchfork Ben Tillman in dealing with these problems.

There is another point that is made over and over again: that blacks can't form voting coalitions with whites and, therefore, we need the Federal Government to come in and create black wards. That simply is not the case. Again, let me use Charleston County as an example. That argument was made down there despite the fact that two blacks out of a nine member council were being consistently elected with strong white support. Those kinds of arguments simply overlook the facts or try to see something that is not there.

Laughlin mentioned this business of lower black voter registration. There is no question that that's true. Unfortunately, it is true nationwide. If you look at the statistics -- they are available, the U.S. Bureau of Census compiles them every two years after general elections -- you will see consistently that anywhere in the country, not in just Section 5 jurisdictions, black registration runs about 10% below white registration in terms of those eligible to vote. It is interesting, if you look further at those figures, to see some of the patterns though. The lowest percentage of black voter registration is among the youngest aged people, the people who have never been subject to the tests and devices of the old discriminatory systems. Ironically, although understandably, the highest percentage registration tends to be in the age bracket of 45 to 65 years old among black people. Those are people who have had the raw experience of having the right to vote denied to them in the past. They know how valuable the vote is. They get out and register in high percentages. The younger blacks do not. That is also a pattern among younger whites as well. If we are going to look at low voter registration, let's be candid about it. It is a nationwide problem that will not be solved by Section 5. Black voter registration in the northeastern states, for instance, shows the same pattern of it's lagging behind white voter registration. In the period from 1964 to 1976 the percentage of eligible blacks who actually registered and voted dropped form 68% in the northeastern quadrant to 54%. That is part of the general pattern of voter apathy. Since the early 1960's in this country there has been approximately a 20% decline in participation and it is still declining today, unfortunately.

Mr. McDonald spoke about Edgefield and Horry Counties. He said that these are examples of the fact that South Carolina has not obeyed the Voting Rights Act. Let me correct any misimpression that I may have given. When I said that we obeyed the act I meant we were the only state for the first five years of the Act who submitted our voting changes. The other covered jurisdictions did not. I did not mean to imply that every change had been submitted. There were a few that slipped through the cracks. But let me tell you what happened in Edgefield and Horry Counties both since he mentioned them. Until we got "Home Rule" in South Carolina, the State Attorney General submitted all Section 5 submissions including the ones pertaining to local governments. For some reason (and it appears to just have been an administrative oversight) there were times when submissions regarding local election changes were not submitted. I have looked through those records and have determined that in terms of changes to elected county governments that happened five times over a period of ten years. In every case the State Attorney General should have made the submissions and did not. Probably because he did not catch the bill after it had passed. It was a local bill. But in any case, the fact that those submissions were not made could not fairly be used to imply that there was defiance or "massive resistance" or that these counties were trying to evade Section 5. It was not their responsibility. The county attorneys were not making the submissions at that time.

Another reason the extension of Section 5 is bad is that extension will perpetuate the power of a bureaucracy in Washington which is unaccountable to the courts. The courts have held that there can be no judicial review of any objection made under Section 5. The Voting Section is unaccountable to any electorate. It is really unaccountable to the law as demonstrated by the fact that it continues to push proportional representation on local governments despite contrary decisions by the courts. Again, I am not here to argue whether proportional representation is or is not good in this county or that city. That is a decision to be made by the people there. It may be good some places, but let's let the people there decide.

Let's not raise these bugbears that it is always a racial issue in our elections or that there is going to be a racial bloc vote. That just is not true. Where there are instances of discrimination, of racially purposeful devices to deny access, then let's do what we traditionally do, which is to go to court over that. There are other provisions of the Voting Rights Act to allow federal examiners to come in and register voters. Those have been used in the past very effectively. No one is talking about repealing those, because they aren't in Section 5. We have the tools to deal with racial discrimination when it occurs. But let's not take this other approach which deprives us of the chance to make our own choices about the way our governments are run and which turns these issues into racial issues when they shouldn't be. For heaven's sake, we have had enough of racial election registers and the race issue in politics. We haven't completely outgrown it, I'm candid and I will be first to admit that, but we have grown up a lot. Anyone who says that we have not is not being candid.

Let's foster the progress in the direction we have followed in the past. Progress has come when we recognize that we are all Americans and that the issues that divide us should not be issues of race. As long as we make every question something with racial overtones -- and the tendency of Section 5 has been to do just that -- we will continue to perpetuate that kind of attitude and that kind of thinking.

Why put an incentive on racial bloc voting by herding minorities into "safe" districts and then giving them nothing except the bloc vote? That is poor solace. That is second-class citizenship of the worst sort. People who promote that can't be serious about equal participation in the political processes. Section 5 fosters that kind of thinking rather than discourages it. It promotes "separate-but-equal" political representation.

AUDIENCE QUESTIONS

Q. Is South Carolina worse than Georgia?

MR. BELL: I just want the gentleman to know that Georgia has the dubious distinction of leading all Section 5 jurisdictions in the number of times that the Justice Department has objected to its changes, 226. No one even comes close --- the nearest competitor is Louisiana followed by Texas, but you lead the pack. South Carolina didn't have a single objection under Seciton 5 for the first seven years of the Act and has never had an objection to either a voting procedure or voting method. They have been mostly to such things as annexation and reapportionment plans.

Q. Mr. Bell, during your presentation, I did not know at times whether you were for or against the extension of the Voting Rights Act, particularly to and you eluded to on occasions, elimination of Section 5 because you were making a very good case for the continuance. But not only for the continuance, and my question is, you admitted by saying during your presentation that there are problems all over the United States, such as people participating in the voting process and the fact that you eluded to young people who don't vote very well and I know that is true everywhere, but I think my bottom line question is would you not agree that because you made such a good case in behalf of the extension thereof and the fact that it needs to apply to all of the states that it ought to be law without having to be extended ten years from now. You just gave me some good argument on behalf of that rather than convincing me that it ought not to be.

MR. BELL: The answer to the question is "no." I don't thing it should be made permanent. No, I do not think it should be extended. The reason is because these problems, such as low voter participation, that you have alluded to, really are not going to be remedied by Section 5. Just as extension of Section 5 is not going to make young white people more interested in the political process it will not increase interest among young black people. Section 5 simply is irrelevant to those kinds of problems. Learned Hand once said, and I think this is the key, "Liberty lies in the hearts of men and women. When it dies there, no constitution, no law and no court can save it." We are not going to solve those kinds of problems by Section 5. I think that anyone who argues that Section 5 is he answer, simply doesn't want to look very closely at the record and see that it is plain that Section 5 enforcement has had nothing to do with the bringing of blacks and language minorities into the political process. I think that we all agree that minority participaton is good and long overdue, but these other problems simply don't warrant extension of Section 5. No, I don't think it addresses this problem, so I don't think that is an argument for extending it.

Q. Does South Carolina have multi-member districts in South Carolina and single-member in the House?

MR. BELL: Our Senate has both multi-member and single-member districts. The House has straight single-member districts.

Q. (question inaudible) (has to do with whether South Carolina's Senate Plan discriminates againsts blacks).

MR. BELL: That question has been litigated repeatedly in the Federal Courts. Each time the Federal Courts have said that our Senate plan was not designed with a racial discriminatory purpose and it doesn't have a race discriminatory effect. That doesn't mean that everybody agrees that it is the best way to apportion our Senate, but it has been given a clean bill of health, not once or twice but several times by the Federal Courts. The Justice Department also precleared that plan after the 1970 census. Later under an order from the Federal District Court in Washington, D.C. -- who knows what they had to do with it, but they got into the act -- told the Justice Department to object to that plan and they did. The U.S. Supreme Court in a case called Morris v. Gressette said that objection was illegal and the court had no authority to order the Attorney General to object. Senate offices have always been separate seats. When we had to change from our "little federal system" where each seat represented one county, we simply maintained the separate offices, but we have had that since our independence in 1776. You run for a specific office.

CLOSING COMMENTS

MR. BELL: I think it is significant that Laughlin continues to use the phrase "disestablish at-large districts." That sounds somewhat like disestablishing segregated school systems. But the equation really doesn't work. Unlike dual school systems at-large districts in themselves are neither good no bad. They are something for people to choose as their form of local government to meet their local circumstances. All of this brings out very pointedly, what seems to me to be critical, which is that Section 5 is being used by the Justice Department to disestablish at-large districts and put in their place "ghetto" districts. This is an ill-conceived affirmative action program to create as many high concentration black districts as is possible in the jurisdictions covered by Section 5.

It is no secret when you listen to the analysis being put forth by Mr. McDonald and other proponents of Section 5 that they have a great hostility to the law as the Supreme Court has laid it down. People have always been hostile to what the Supreme Court says we should do. They were hostile to the Brown decision as well. This hostility to the Supreme Court is justified by saying that the Court has created an impossible legal standard to comply with the standard of proving discriminatory intent. Well, that standard is the same standard that was to desegregate schools first in the South and later in the North and West. It is the standard by which employment discrimination cases are being judged. If you think it is an impossible standard you aren't reading the cases that come into the advance sheets. Every week people are proving that their rights have been violated under those standards. I am the first one to say that if the rights of people are being violated, and especially if it is on account of their race or color, the full power of the law should be brought to remedy that. That is not the issue. The issue is the extension of Section 5.

Why should Section 5 not be extended? Because it is based on a political theory which is completely at odds with our democractic traditions. It is a theory which prefers for political solutions to be imposed administratively from the top rather than representationally from the bottom. That is not democracy. It is an elitist, technocratic, managerial approach. Bureaucrats don't like politics because politics are unpredictable. Politics are untidy and there is too much give and take. It is not a neat predictable thing that you put into a computer and get a nice, punched out systems analysis answer. But bureaucratic preference is no reason for extending Section 5.

Section 5 is based on a theory which extends political equality in form while debasing it in substance. That's all proportional representation is, and it has been tried before. It was tried in Weimar, Germany. It was tried in the French Fourth Republic. It has been tried in modern Lebanon. It does not lead to effective government. It does not lead to broad based political concensus within a society. The record of history is clear.

Section 5 is based on an elitist aversion and suspicion of the political marketplace where we can't always have our ideas and our own ways in their pristine form, where there is give and take, and where things are sometimes unsystematic. It is impatient with the discipline of politics and consensus building. It wants to insulate minority groups from that. Allow them to elect people of their own language or color who then sit as isolated voices in the wilderness rather than working for the consensus that builds bridges between all of us regardless of our race or our religious background or our national origin. That is the American tradition, but it is the tradition which is opposed by the Section 5 approach. Sections favors the "us/them" view instead of the "we, the people" view of the Constitution. It emphasizes racial division and identity. It put a premium on and creates an incentive to define political groups in terms of the color of their skin. The word "victim" was used by Senator Mitchell. It places a premium on seeing people as victims, instead of seeing them as citizens, victims who somehow are unable to muster the goodwill of their fellow citizens to urge their rights and their points of views.

I have a different view. I do not deny the unfortunate history of discrimination we have had, not just against black minorities, but against religious minorities, ethnic minorities, and others in this country. But I know that our deepest values as a nation have always called us to be better in the future than we have been in the past. The trend in our history has been to extend greater equality to all members of the American family, to be ever more true to the principles of the Declaration of Independence. What I don't like about the arguments for extension of Section 5 is that they play on hysteria and division and fear. They are based on an assumption which I know from my own experience is not true -- that white Americans are basically unfair, that white Southerners are waiting for Section 5 to expire so that they can push everything back, so that they can let the police dogs loose on the Selma Bridge again. That simply is not my reading of the heart and mind of the American people or people in the South. We are growing. We still have a long way to go, but we are on the right road heading in the right direction. In the end, Section 5 has nothing to do with the real problems and there is no reason for extending it.

PREPARED STATEMENT OF EUGENE W. HICKOK, JR., DICKINSON COLLEGE, CARLISLE, PA

VOTING RIGHTS AND REPRESENTATION

Sometime this winter the Senate will commence deliberations concerning extending the 1965 Voting Rights Act. The hearings, which will be held by the Subcommittee on the Constitution of the Senate Judiciary Committee, should be the stuff of great theatre. If debate follows the pattern set in 1970 and 1975, when the original act was extended, those favoring extension will argue that discrimination still exists and that the Voting Rights Act is the primary means of safeguarding minority access to the voting booth. Those opposing extension, predictably, will argue that the act has accomplished its purpose and that extending it is not only unnecessary, therefore, but constitutes unfair treatment toward a huge portion of this country's states and localities. Both proponents and opponents of extension offer strong arguments and raise important issues. But if the debate fails to transcend concerns of racial and class prejudice and states rights, a terrible disservice will have been perpetrated. For debate concerning the extension of the Voting Rights Act, especially as the original legislation has been altered by the House, should focus upon the most fundamental issue in American government: Representation.

In 1965, Attorney General Katzenbach argued that a voting rights act was needed to ensure that the Fifteenth Amendment of the Constitution was upheld. The intent of the Act was "to increase the number of citizens who can vote." The goal was to ensure that blacks, particularly in the South, were not barred from registering to vote. The Johnson Administration intended to accomplish this in two ways. First, by suspending all "literacy" tests and similar devices which had been used by local officials to limit minority access to the ballot. Second, by sending federal officials into regions where discrimination was alleged who could ensure the fair administration of the voter registration system.

Not only was the intent of the original act clear, but its impact is well documented. The Voting Rights Act is probably the single most successful piece of civil rights legislation ever passed in this country. Since 1965, the percentage of eligible blacks registered to vote has increased dramatically. Likewise, the number of blacks elected to the state legislatures and to local offices in targeted areas has increased also. And similar progress has been recorded for those minorities that have come under the protections embraced in extensions of the act. The Voting Rights Act has been successful. But sponsors of the legislation currently awaiting Senate consideration say that discrimination continues, sometimes in very subtle yet effective ways, and, therefore, the act must be extended. Perhaps. But they propose to alter the present law in such a way as to suggest that the presence of discrimination provides sufficient cause to alter the idea of political representation in this society.

The legislation the Senate will consider differs from the current law in a fundamental way. Currently, Section 2 of the Act represents a codification of the Fifteenth Amendment, protecting citizens from having their right to vote denied due to race or color. As interpreted by the courts, a violation of this Section requires a demonstration of intention or purposeful discrimination. The proposal coming before the Senate embraces a standard for identifying discrimination that looks to the racial effects or impact of some voting action rather than whether or not that action was undertaken with the intent to discriminate. In other words, any change which might have the effect of altering the makeup of an elected assembly in such a way as to lay open the possibility of a decrease in the number of minority-held seats could be found to be in violation of the law.

The imposition of an "effects" test in place of an "intent" test for voting rights resembles similar strategies employed by those eager to end discrimination in employment and education. Determining the motives behind one's actions, it is argued, is very difficult to do. Measuring the effect of those actions is much easier. Nobody disputes this. However, when instituting an "effects" test in voting one alters in a fundamental way what is meant by representation in this republic by promoting the development of a system of proportional representation in which it is implied that individuals have a right to seats in a legislature as well as a right to vote. This goes beyond ensuring free access to the voting booth. It transforms the Fifteenth Amendment from one prohibiting discrimination to one requiring racial balance in representative assemblies.

The idea of proportional representation was cast aside by the Framers of the Constitution as being incompatible with political freedom. In Federalist #35, Madison states that "the idea of an actual representation of all classes of the people by persons of each class is altogether visionary." Those favoring such a scheme argue that all classes of citizens should have some of their own number in the representative body in order for their feelings and interests to be better understood. But, as Madison observed, "this will never happen under any arrangement that leaves the votes of the people free."

A system of proportional representation substitues one notion of representation for another. The Framers understood representation to be a process of "refining and enlarging the public views." Representation was, as they understood it, a matter of style and focus. It concerns how one decides an issue more than the decision itself. A representative could exercise trusteeship and act upon his best judgment, or he could attempt to act more as a delegate and decide issues in accordance with the will of those he is elected to represent. More often than not, some combination of trusteeship and delegation would occur, thus providing decisions which are derived through reason and deliberation which would meet with the approval of the citizens. Proportional representation shifts the emphasis from process to product by implying that sound decisions effecting one class of persons can be made only by persons of that class. The quality of representation in such a system is measured, therefore, by the makeup of the representative assembly rather than the obligations and responsibilities of the elected officials. The goal of such a system becomes the development of a legislative body the makeup of which mirrors the society it represents.

The Framers sought to erect a government in which representatives would reach decisions that reflected the best interest of the citizens. They sought to capitalize upon the diversity of American society by establishing a system which would promote the mingling of various points of view, thus protecting minority rights while ensuring majority rule. Representatives would satisfy the concerns of the people or be replaced through elections. Rather than setting off classes of citizens against one another in a legislative assembly, the Framers opted for a system aimed at erasing class distinctions.

During the debates that led to the Constitution, Madison observed that "we have seen the mere distinction of color made in the most enlightened period of time, a ground for the most oppressive dominion ever exercised by man over man." The problems of racial and class prejudice continue to plague this country. A voting rights act aimed at ensuring equal access to the ballot has and can continue to contribute to the eradication of racial discrimination. But a representative system may be made undemocratic not only by attaching unwarranted qualifications upon suffrage but also by attaching unwarranted qualifications upon the right to hold public office. A system of proportional representation establishes such qualifications and the proposals to alter the current voting rights law open the door to the development of just such a system. Those of us interested in ending racial discrimination should recognize that Madison was correct to assert that in a democracy, measures which inhibit individual freedom while attempting to address some injustice often represent cures which are far worse than the disease.

PREPARED STATEMENT OF CLARENCE PENDLETON

I believe that a ten-year extension of current law along the lines suggested by the President is the most desirable course. This is longer, as you know, than any previous extension.

An "effects" test for those jurisdictions, chiefly in the South, which have to pre-clear electoral changes with the Justice Department has proven its worth, and under the President's proposal will and should remain in place.

Extending an "effects" test to the rest of the nation is an entirely different matter. I am unaware of any compelling evidence which indicates the necessity of so major an expansion of the law's scope. If I believed such an expansion were necessary to protect the gains already achieved by the Act, I would not hesitate to recommend it. But I do not believe it is necessary, and I am unaware of anything in the hearing record before the House Judiciary Committee which suggests the wisdom of such a course.

Passage of a nationwide "effects" test such as that contained in the House bill may cause undesirable consequences in at least two areas.

First, it will induce a good deal of uncertainty and confusion in an otherwise known and settled body of law. It may take ten years or more for the courts to sort out all the changes.

Second, I am troubled by the implication in the House bill that the only or best way to enhance minority voting rights is to have minorities represented by members of their own race. I am aware that the House bill does not make proportional representation by race a legal requirement, but it does rather clearly suggest that deviation from proportional representation is somehow suspect. This will not only invite endless litigation, as I have suggested, but could lead to results that I consider unwise as a matter of policy. Although I would like to see more minority office-holders throughout the nation, I do not doubt for a moment that minority voters can make their views known and felt other than through the voice of a minority office-holder.

The key to effective representation for minority racial interests is the same as that for any other interest: we must register, organize, and get out the vote. So long as those crucial political processes remain open equally to all, regardless of race -- and that is what the Voting Rights Act is designed to do -- we need not and should not concern ourselves with anything that smacks of proportional representation by race.

ROBERT GARCIA
21st District, South Bronx, New York

Congress of the United States
House of Representatives
Washington, D.C. 20515

COMMITTEES
BANKING, FINANCE AND URBAN AFFAIRS
SUBCOMMITTEES:
HOUSING AND COMMUNITY DEVELOPMENT
ECONOMIC STABILIZATION
FINANCIAL INSTITUTIONS SUPERVISION, REGULATION, AND INSURANCE
POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEES:
CHAIRMAN, CENSUS AND POPULATION
HUMAN RESOURCES
CHAIRMAN:
CONGRESSIONAL HISPANIC CAUCUS

March 3, 1982

Senator Orrin Hatch
125 Russell Building

Dear Mr. Hatch:

I am writing to express my concerns and views to you and to the members of the Subcommittee on Constitution and the Committee on Judiciary regarding the extension of the Voting Rights Act.

My concerns cover vital aspects of the Voting Rights Act before your subcommittee. Section 203 of the 1975 amendment to the Voting Rights Act addressed voting discrimination against language minority citizens. This section covers Native American Indians, Alaskan Natives, Hispanic Americans and Asian Americans. This provision has extended a right to many Americans who for the first time exercised their constitutional right to vote. This Act, and particularly section 203 has had the effect of enfranchising millions of Americans and has made active participants of those who have traditionally been effectively denied directly or indirectly their right to vote.

In order for me to address the Bailout question, it is necessary that I address preclearance. Preclearance provides that a jurisdiction covered under the Voting Rights Act must submit for approval any voting law change. In effect, this provision prohibits any state or subdivision from imposing voting practices in a manner which results in a denial or abridgement of the right to vote. Racial discrimination in the electoral process still exist in America and it is constitutionally justifiable to require a covered jurisdiction to show that discrimination has been corrected before permitting it to bailout from coverage of the Act.

The conditions which prevailed before Congress during the debates over the 1965 Voting Rights Act justifying imposition of extraordinary remedies are still prevalent today. Although they may not be as violent in the physical form, or as obvious as they were prior to 1965, the present subtleties to achieve the same ends continue and have the same impact.

Bailout assures that these jurisdictions found by Congress to have a history of purposeful discrimination be carefully scrutinized, and that they be required to show through reliable evidence that these jurisdictions have not discriminated, whether directly or by effect to deny anyone their right to vote.

I maintain that the actuality of the situation that existed in 1965 still exist today and that the means by which Congress addressed the concerns were necessary and proper and must continue in order to protect this constitutional right.

In 1970, legislative history maintained sufficient evidence in support of the existence of racial prejudice throughout the nation. It is inconceivable to me and the nation to accept that in 10 years we have been able to address adequately the complex dilemma of racial discrimination to the degree that would support the notion that protection against discrimination in every meaning of the word should be eliminated or effectively restricted. Who can believe that what this nation has not been able to address in over 200 years could possibly be adequately addressed in 12 years.

In order to continue the greatness of our nation and our commitment for a more perfect union, I strongly urge you and the members of the Senate to vote for extention of the Voting Rights Act as approved by the House.

Sincerely,

Robt Garcia

Robert Garcia
Member of Congress

RG/lb/vg

POSITION PAPER

ON

THE EXTENSION OF THE VOTING RIGHTS ACT OF 1965 AS AMENDED BY S. 53, S. 1761, S. 1975, S. 1992

SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION
UNITED STATES SENATE

MARCH 11, 1982

HOWARD UNIVERSITY SCHOOL OF LAW
STUDENT BAR ASSOCIATION
AD HOC VOTING RIGHTS PROJECT COMMITTEE
KEITH HARVEST, CHAIRMAN
FREDRICKA WILSON, MEMBER
SHEILA TILLERSON, MEMBER
JAMES MCCOLLUM, MEMBER
DAVID A. LANG, FACULTY ADVISOR

I. IF THE VOTING RIGHTS ACT IS EXTENDED, CONGRESS SHOULD ADOPT THE SO-CALLED "EFFECT" DISCRIMINATION STANDARD, AS OPPOSED TO "INTENT," AS THE STANDARD FOR PROOF OF VIOLATIONS NOT ONLY UNDER § 5 OF THE ACT AS HAS BEEN THE PREVIOUS REQUIREMENT, BUT UNDER § 2 OF THE ACT AS WELL.

The objective of the Voting Rights Act of 1965[1] and its subsequent amendments in 1970 and 1975 was not only to remove discriminatory barriers that denied blacks and other ethnic minorities direct access to the ballot, but also to insure such minority groups a meaningful participation in the political process. Thus the Act outlawed not only overt forms of discriminatory practices that had historically been used to disenfranchise "discrete and insular"[2] minorities, but prohibited the states from devising new and subtle forms of discriminatory voting practices.

The two key sections in terms of the debate over whether intent or effect should be the appropriate standard for determining proof of violations of the Act are § 2 and § 5. The latter section forbids, inter alia, a state or political subdivision subject to § 4 of the Act[3] from enforcing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," unless it has obtained a declaratory judgment from the District Court for the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or has submitted the proposed change to the Attorney General and the Attorney General has not objected to it. The constitutionality of this provision to the extent it incorporates an "effect" standard was upheld by the Supreme Court in City of Rome v. United States, 446 U.S.156 (1980).

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[1] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, as amended by Pub. L. No. 91-285, 84 Stat. 314 and Pub. L. No. 94-73, 89 Stat.402 (codified at 42 U.S.C. §§ 1971, 1973 to 1973bb-1(1976)).

[2] The term derives from a thesis suggested by Justice Stone in a now famous footnote in his majority opinion in U.S. v. Caroline Products Co., 304 U.S. 144, 152, n.4, that instances where "prejudice . . . against "discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry."

[3] Section 4 (b) provided originally that subsection (a) requiring the suspension of tests or devices in determining eligibility to vote, would apply to any state or political subdivision which maintained any test or device on November 1, 1964, and where less than 50 percent of the voting age residents were registered on November 1, 1964, or less than 50 percent of such persons voted in the presidential election of 1964. By congressional amendments this standard was extended on and after August 6, 1970, using

§ 2 of the Act by contrast does not mention the term "effect," simply providing, "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Prior to the Supreme Court's decision in City of Mobile v. Bolden, 446 U.S. 55 (1980) a few lower federal courts had used this section to strike down some voting and election practices not covered under § 5 either because they were in existence before 1965 or because they arose in a jurisdiction not covered by § 5, and in doing so applied an effect discrimination standard under § 2 as well. Cf. McMillan v. Escambia County, Florida, 638 F.2d 1249 (5th Cir. 1981), with

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November 1, 1968 and the November 1968 presidential election to measure, respectively, registration and voting percentages, and then further using November 1, 1972 and the presidential election of November 1972 as the measuring dates for areas that would be barred from using tests or devices on and after August 6, 1975. The 1975 amendments also added "membership in a language minority" to race and color as categories protected under the Act against deprivation of the right to vote.

Lodge v. Burton, 639 F.2d 1358 (5th Cir. 1981) *cert. granted*, *Rodgers v. Lodge*, —— U.S.—— (1981), (No. 81——), *Cross v. Baxter*, 639 F.2d 1383 (5th Cir. 1981), and *Thomasville Branch NAACP v. Thomas County, Georgia*, 639 F.2d 1384 (5th Cir. 1981).

In *Bolden*, however, a plurality of the Court speaking through Justice Stewart cast doubt on the validity of an effect discrimination theory under § 2 by concluding that it was nothing more than a codification of the Fifteenth Amendment stating that "the sparse legislative history of § 2 makes it clear that it was intended to have an effect no diferent than that of the Fifteenth Amendment." 446 U.S. 60-61. Although this characterization may be properly called dictum, since the Court did not specifically pass on the § 2 claim, instead basing its decision on an interpretation of the Fourteenth and Fifteenth Amendments, it has nonetheless shed doubt on those lower court decisions that had used an effect standard. This is because the Court in *Bolden* held that intent was the only permissible standard for proof of violations of the Fourteenth and Fifteenth amendments where the claim was a discriminatory dilution of the voting strength of racial or ethnic minorities.

In response to what it considers an erroneous reading of the congressional intent behind § 2, the House Committee on the Judiciary to whom was referred the bill (H.R. 3112) to amend the Voting Rights Act of 1965 has recommended an amendment in the nature of a substitute which, *inter alia*, "intends to restore the pre-*Bolden* understanding of the proper legal standard which focuses on the result and consequences of an allegedly discriminatory voting or electoral practice rather than the intent of motivation behind it." HOUSE COMM. ON THE JUIDICIARY, 97TH CONG., 1ST

REPORT ON VOTING RIGHTS ACT EXTENTION 29-30 (Comm. Print 1981).

The Howard University School of Law community supports wholeheartedly the foregoing recommendations of the House Committee on the Judiciary that Congress clarify § 2 of the Act when it is extended by adopting the effect standard rather than the intent standard to establish unlawful discrimination under the prohibited categories of the Act. Furthermore, it is our position that "effect" should remain a legal standard under § 5 along with that of "intent" in those cases where the latter is provable.

A. The Effect Standard Which is a Derivative of the Common Law Standard That a Man is Responsible for the Natural and Forseeable Consequences of His Actions, is the More Enlightened Standard When Balanced Against a Fundamental Constitutional Right Such As Voting, and is the Prevailing Standard Designated by Congress Under Other Statutes Designed to Prohibit Discrimination Against Discrete and Insular Minority Groups.

That a man is responsible for the natural and forseeable consequences of his actions--whether intentional or not--is an ancient yet presently valid principle in the common law of torts. See W. PROSSER, HANDBOOK ON THE LAW OF TORTS (4th ED. 1971). A parallel to this concept--that a person should be responsible not only for the consequences of his intentions, but also for his illegal unintended actions--is found in criminal law. For example, when a homicide is committed in modern society, the wrongdoer may be punished for this wrongful act, whether intentional (murder) or unintentional (involuntary) (manslaughter). See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW (1972). The underlying fundament behind these concepts is the notion that a person should not be able to escape legal sanction merely under the pretext of declaring that the consequences or effects were not intended. The law must intervene at the moment of the consequences to avoid the undermining contravention of rules basic to the functioning of an orderly society.

Thus recognizing the inherent justice in the effect standard, it has been found to be the prevailing standard adopted by Congress in both Reconstruction and modern civil rights legislation. See e.g.., Griggs v. Duke Power Co., 401 U.S. 424 (1971) where the Supreme Court found that the Congressional intent behind Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., was to reach the "consequences of [discriminatory] employment practices, not simply the motivation." Id. at 432. (Emphasis in original); Davis v. County of Los Angeles, 566 F.2d 1334, 1340 (9th Cir. 1977) (a showing of disproportionate impact is sufficient to establish a prima facie case of employment discrimination under the Civil Rights Act of 1866, 42 U.S.C. § 1981), vacated and remanded as moot, 440 U.S. 625 (1979); Clark v. Universal Home Builders, 501 F.2d 324 (7th Cir. 1974) (housing discrimination under the Civil Rights Act of 1866, 42 U.S.C. § 1982, judged by an effect standard); and Village of Arlington Heights v. Metropolitan Housing Development Corp., 588 F.2d 1283 (7th cir. 1977) (housing discrimination under Title VIII if the Civil Rights Act of 1964, 42 U.S.C. § 3601 et seq., judged by an effect discrimination standard).

In the employment setting of Griggs, supra, the Supreme Court noted that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." Id. at 432. Likewise, discrimination in voting may be present in situations where intent is lacking or difficult to prove in the legal setting. To allow the legal determination of discrimination in voting to be measured in terms of motive rather than consequence would prevent the effective support and enforcement of the statutory purpose. Voting has been acknowledged as existing on the highest tier of rights available to persons in this society. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). The objective of the Voting rights Act, plainly, has been to insure equality in the exercise of this fundamental right, and to remove any barriers which exist contrary to the statutory objective.

Correspondingly, the effect standard is the more enlightened standard when applied in the area of such a fundamental constitutional right as voting. Any deviation from the present effect standard would dilute a potent statute which has provided a legal bulwark against continued denial of the voting opportunities inherent to the successful operation of the democratic process. Discrimination is conduct--conduct and actions which may be intentional or unintentional. To allow voting discrimination to be judged by the standard of intent rather than effect would fail to balance the fundamental right to vote against the potential and existing practices which would deny that right. Just as importantly, the sanctioning of an intent standard would allow a gaping hole to exist in the Voting Rights Act by which discriminatory conduct and actions could always escape without legal accountability. To paraphrase what the Supreme Court said in a slightly different context, "good intent or absence of discriminatory intent cannot redeem [voting] procedures . . . that operate as 'built-in headwinds' for minority groups . . . ." Cf. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

B. The "Effect" Standard Would Detect Sophisticated Forms of Discrimination That a Test of "Intent" Would Miss, Thus Better Effectuating the Ends That the Voting Rights Act Was Originally Designed to Promote.

In Beer v. U.S., 430 U.S. 130, 141 (1975) the Supreme Court in reviewing the congressional intent behind § 5 of the Act stated, "Congress explicitly stated 'the standard [under § 5] can only be fully satisfied by determining on the basis of the facts found by the Attorney General [or district court] to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is augumented, diminished, or not affected by the change affecting voting . . .'" (Emphasis in original). Hence, the first enlightened Congress to pass the Voting Rights Act, as well as subsequent sessions of Congress that voted for its extension, have recognized that the meaningfulness of the right to vote must be measured in two phases of the entire political process, participation and election. Under this view, the right to vote, itself, is merely a means to an end not the entire political process in and of itself.

When judged by the standard of meaningful participation, an intent standard would allow many invidiously motivated and invidiously maintained systems presently in existence to escape detection and perpetuate the very constitutional injustices that the Voting Rights Act was designed to prevent. These sophisticated schemes are numerous, though the more common seem to be at large elections, majority voting requirements, anti-single shot voting provisions, redistricting, and the annexation of or failure to annex surrounding territory by political subdivisions, whichever in the latter two cases would result in the maintenance of the status quo in derogation of minority voting interests.

The Bolden case, supra, which has engendered most of the current debate, is itself illustrative of the difference in outcome in assessing the legality of some electoral schemes when an intent rather than an effect based test is used.

In Bolden the challenge was to the system of municipal government in Mobile, Alabama which consisted of three members of a commission elected at large, who jointly exercised all legislative, executive, and administrative power in the municipality. The action brought by black citizens of Mobile alleged that the practice of electing commissioners at large unfairly diluted their voting strength in violation of the Fourteenth and Fifteenth Amendments and § 2 of the Voting Rights Act.

The district court found that the at large system violated the Fourteenth and Fifteenth Amendments. It did not pass on the statutory claim. In reaching the decision it relied on a panoply of factors, but chief among them was that no black had ever been elected to the City Commission due to the "pervasiveness of racially polarized voting in Mobile."

The standard for proof of violations that the district court had applied was a species of an effect standard coming from an earlier Fifth Circuit case, Zimmer v. McKeithan, 485 F.2d 1297 (5th Cir. 1973). There the Fifth Circuit had catalogued a non-exhaustive list of factors that would tend to establish that a particular electoral scheme would dilute the voting strength of an historically victimized minority. In addition to the lack of minority representation, these included (1) a lack of access by blacks to the slating of candidates or the candidate selection process; (2) unresponsiveness of elected city officials to the needs of blacks; (3) a tenuous state policy underlying the preference for multi-member or at large districts; (4) a history of racial discrimination precluding blacks from effectively participating in the political system; and (5) enhancing factors such as: (2) a large district; (b) majority vote requirements; (c) no provision for single-shot voting; and (d) no residency requirements. Id. at 1305-07. In Zimmer the court of appeals explained that an aggregate, but less than all of these factors should be established in order to obtain relief. Thus, the Zimmer court noted that plaintiff in southern districts with long histories of active policies of voter discrimination were more likely to establish those criteria then those challenging at large or multi-member schemes in other areas.

The Fifth Circuit consequently affirmed the district court's ruling in Bolden of unlawful vote dilution through the effects of the at large scheme based on the application of the Zimmer criteria. The Supreme Court reversed applying intent as the appropriate standard under the Fourteenth and Fifteenth Amendments. It remanded to the lower courts to reexamine the at large scheme in light of the intent standard. The Bolden plurality discounted the critical factor on which the lower courts had relied--the total absence of black representation in the commissioner seats--and further indicated that this fact standing alone was not sufficient to show that the system had been adopted or maintained with a discriminatory purpose.

In Bolden the at large system at issue was adopted in 1911 pursuant to authorizing state legislation. Thus it was not subject to the preclearance provisions of § 5 of the Voting Rights Act since its existence predated the statute. It was subject only to a statutory challenge under § 2 of the Act as the Bolden plaintiffs correctly concluded in seeking relief under that section. The intent standard suggested in dictum by the plurality in Bolden as the proper standard under § 2 will doubtless be difficult for the plaintiffs to prove on remand for the very reason that pervasive public and private discrimination was practiced so widely in Alabama in 1911 when the at large scheme was first adopted. Since black disenfranchisement through violence, intimidation, and discriminatory devices was complete by then, it is doubtful that the effect of an at large system on black voting strength was of any moment to any legislator in the state in 1911. Consequently, it can scarce be posited that the at large system was initially adopted with a racially discriminatory motive. The use of an intent standard produces this unfair and anomolous result. The effect standard by contrast employed in Bolden by the lower federal courts strikes down this antiquated system which presently results in the continuation of the dilution of the black citizens of Mobile's effectiveness at the polls just as much as threats, intimidation, and harassment coupled with pervasive public and private discrimination did in 1911.

Therefore, it is for these foregoing reason that we recommend that the effect standard be extended to apply to § 2 of the Voting Rights Act in addition to being retained as the standard under § 5. The result would be a viable mechanism for the eradication of discrimination that was historically in existance prior to the invidious enactment of the Voting Rights Act.

PREPARED STATEMENT OF JOHN E. JACOB, PRESIDENT, NATIONAL URBAN LEAGUE, INC.

As President of the National Urban League, I thank you for the opportunity to submit testimony for the record on the extension of the Voting Rights Act. The National Urban League is a 71-year old non-profit community service organization which has historically been concerned with seeking equal opportunities for all Americans in all sectors of our society. Through our network of 118 affiliates nationwide, we are dedicated to educating the poor and minorities to their fundamental rights as citizens of this country, advocating the enforcement of those rights when they are neglected, and opposing the erosion of those rights when they are jeopardized. Therefore, the National Urban League is pleased to express its strong support for S. 1992, a bill to extend key provisions of the Voting Rights Act of 1965, the most effective piece of civil rights legislation ever enacted.

Since passage of the Act, we have witnessed significant increases in black voter registration as well as black elected officials. The abolition of the poll tax, the presence of federal examiners, the ban of literacy tests and objections to racial gerrymandering have allowed black voter registration to climb to over 3.5 million.

More than one million black voters were added to the registration rolls between 1965 and 1972. In Mississippi, for example, less than 7 percent of the black voting age population was registered before 1965 and the Voting Rights Act; by 1976, 67 percent was registered. In 1975 there were four blacks in the Mississippi State Legislature and today there are 17. The latter 13 owe their seats to protracted litigation made possible by the Voting Rights Act.

Yet, even with the many successes of this law, we still witness continuing efforts to keep the black vote impotent. Since 1975, the Justice Department has filed over 500 Section 5 objections to discriminatory electoral changes, illustrating that it is no secret that jurisdictions continue to maneuver the minority vote into powerlessness. These objections provide a clear public record that attempted annexations, at-large voting systems, and boundary changes are still being used to thwart the basic commitments of the Voting Rights Act. Indeed, the more than five months of hearings held here in Washington, in Alabama, and Texas by the House Subcommittee on Civil and Constitutional Rights yielded strong and unequivocal evidence that minorities continue to suffer the cleverness of voting oppression at the hands of those who would discourage minority registration, dilute the minority vote, and thereby render meaningless this most precious franchise.

Yet, recent statements made before this Subcommittee would lead one to believe that the record of the House Subcommittee on Civil and Constitutional Rights was made through intimidation and coercion. That is unfortunate, for the facts are clear and speak for themselves.

For example, while black voter registration has dramatically increased in Mississippi since 1965, there have been as many Justice Department objections to electoral changes there since 1975 as there were between 1965-75. Section 5 prohibitions and court challenges have rejected more than 30 attempts to switch to at-large voting systems. Given the fact that white registration in Mississippi more than doubles black registration (690,272 to 304,146), at-large voting schemes effectively dilute the black vote and generally lead to the election of white candidates.

Reminiscent of post-Reconstruction and malapportionment are recent attempts by 14 Mississippi counties to gerrymander boundaries of county supervisors' districts. Consequently, only 27 of 410 county supervisors are black.

Mississippi has also attempted to block black independent candidates from running in statewide elections. The "open primary" bill has been introduced in the State Legislature in 1966, 1970, 1976, and 1979. It would eliminate party primaries and require a majority vote to win office. The end result of such a proposal would be that black candidates running as independents would not have a fair and equal opportunity to participate in the electoral process.

We of the Civil Rights community believe there is an answer -- the strength and fairness of which cannot easily be denied. For S. 1992 is before us today with no less than 62 bi-partisan co-sponsors. Its companion, H.R. 3112, passed the U.S. House of Representatives by an overwhelming vote of 389-24. We believe it is an initiative both responsible and prudent, commensurate with the intent and purpose upon which the Voting Rights Act was based.

S. 1992 would:

(1) Extend Section 5 (the preclearance provision) indefinitely, while allowing jurisdictions to be excluded from coverage upon proof that discriminatory activities have been eliminated;

(2) Amend Section 2 by clarifying the burden of proof required of plaintiffs under the Act;

(3) And, extend the bilingual provisions of the Act until 1992.

Opponents of the bill have made serious and, we believe, unfair criticisms of some of the components we support. Because we feel it imperative that confusion and distortions not hamper the passage of this initiative into law, the following remarks address those criticisms.

Section 5 and the Bail-Out Provision

Some critics of Section 5's bail-out provision have labelled it "extreme," asserting that its requirements "would be exceedingly difficult to meet." Such criticism is particularly ironic in light of the fact that the S. 1992 bail-out measure is a liberalized version of the present provision. It would, in fact, allow not only states, but counties to be excluded from Section 5 coverage upon a showing of non-discrimination.

A jurisdiction would be required to show on behalf of itself and its political subdivisions that in the preceding 10 years, the jurisdiction had (1) compiled with the Act; (2) abandoned discriminatory voting procedures and practices; and (3) taken positive steps to include minorities fully in the political process. In short, jurisdictions that continue to discriminate will remain covered and those that have eliminated illegal activities will be allowed to bail-out.

The Joint Center for Political Studies has projected, based on available data, that more than 20 percent of the counties now covered under the Act will be eligible to bail-out in 1984.

We strongly believe that the criteria embodied in the bail-out provision represent a fair and reasonable complement to the extension of Section 5.

Section 2: Intent v. Results

Section 2 of the Voting Rights Act is a permanent provision covering all states. And though it mirrors the 15th Amendment's guarantee of the right to vote, we know it is not enough. We must now push to synchronize basic voting discrimination law to parallel what we know to be integral to the right to vote. S. 1992, we believe, appropriately addresses this issue.

Mobile v. Bolden makes necessary the amending of Section 5. The 15th Amendment does not establish any test of purpose; it says categorically that no one shall, on account of race or color, be denied the right to vote. It assumes -- and indeed how could it not? -- that the fact of denial is evil enough, without inquiry into the minds and intents of the deniers. And before Mobile v. Bolden, no one seriously doubted that the Voting Rights Act operated on that same basis. However, in order to clarify the realistic needs of potential victims of voting discrimination, we must now, by statutory amendment, insist that activities which result in a denial or abridgement of the right to vote be prohibited.

Recent criticism of this amendment assumes that proponents, in effect, are seeking a "quota requirement" of proportional representation. In addressing this concern, particularly in regard to at-large elections, the amendment to Section 2 states "the fact that members of a majority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation." The amendment would in fact, merely return to a "totality of circumstances" approach -- the same approach found in earlier Supreme Court cases /Whitecomb v. Regester (1973)/ which deny the right to win a particular proportion of offices or seats; the same approach which requires the court to consider one particular factor in addition to many others.

Without this amendment, plaintiffs would face the impossible and ridiculous task of getting defendants to confess to an intent to break the law. Beyond that, much of the evidence is non-existent, since, in many cases, records were not kept, the culprits have long since died or the governmental body failed to record debates or other legislative history. We cannot help but wonder whether the intent test is in fact, another way to allow the continuation of obviously discriminatory practices.

There can be no question that it is within Congress' authority to amend Section 2 as specified by the present initiative. For the Court has long held that Congress is empowered to legislate enforcement objectives in relation to the issues addressed in the 15th Amendment /South Carolina v. Katzenbach, 383 US 301, 317, 326 (1966)/.

We cannot afford to differentiate between reasons why the votes of black and other minorities are short-changed or diluted: one reason is patently as bad as another. It may be nearly impossible to get inside the heads of John Doe or Richard Roe and pick out specific intent for specific acts. But it is not difficult to see the social intent which lies behind and expresses itself in political structures and processes which hold back what the Supreme Court once called "discrete and insular minorities." Indeed, it is hard to avoid seeing it; only the singularly willful can manage to do so.

Section 5's explicit requirement of non-discriminatory effect as well as purpose explains what architects of the Voting Rights Act had in mind when voting discrimination was outlawed in 1965. It was generally understood that the clear unlawfulness of the denial of the right to vote, as expressed in the 15th Amendment and Section 2, needed no further explanation. Now, however, since it has become necessary to do so, we strongly urge the addition of language in Section 2 proscribing practices which result in a denial or abridgement of the right to vote on account of race, color or membership in a language minority.

Bilingual Provisions

S. 1992 would also extend the bilingual provisions of the Act until 1992. These provisions require the use of bilingual ballots and other written materials and oral assistance during the registration and voting process.

Some detractors on this issue cite cost as a reason not to extend these provisions now. Yet, the cost of bilingual assistance is minimal if efforts are properly targeted. Los Angeles County, for example, has a bilingual compliance program that targets Spanish-speaking voters effectively and inexpensively. For the 1980 general election, more than 45,000 persons requested Spanish-language materials. The cost was only 1.9 percent of the total cost of the election.

Others argue that participants in the American electoral system should be required to speak English; that is, the very fact that they cannot should bar their voting privileges. We cannot agree with such logic.

The provision of English-only election materials and voter education creates an effective barrier to voting for hundreds of thousands of American citizens who are not sufficiently proficient in English to utilize it in voting. The bilingual provision of the Voting Rights Act encourages these people to participate in American life by exercising a right fundamental to all Americans.

Conclusion

The preservation of voting protections, as embodied in S. 1992, is integral to the fundamental well-being of millions of Americans. We could not and should not be satisfied with anything less than all the components it proposes. For if these times are not propitious for moving ahead, let them not be ripe for moving backward. Accordingly, we strongly urge you to seek the passage of this bill into law.

PREPARED STATEMENT OF REPRESENTATIVE DON EDWARDS IN SUPPORT OF S. 1992

Mr. Chairman and members of the Committee, I appreciate the opportunity to appear before you today to urge you to join with your colleagues in the Senate and nearly 95% of the House of Representatives in endorsing S. 1992 and H.R. 3112.

I am delighted that the majority of this august body has recognized the need to continue the important special provisions of the Voting Rights Act and the desirability of adding incentives to the Act which encourage jurisdictions to open their electoral processes to greater participation from all their citizenry.

Your are, no doubt, quite familiar with the fact that my subcommittee held 18 days of hearings and took testimony from 122 witnesses who appeared before us here and in Alabama and Texas. The burning issue before us was whether the special provisions of the Act, particularly section 5 preclearance, were still needed. So compelling was the record in the House, that the focus of your hearings has shifted to the amendments to sections 2 and 4 of the Act which we adopted. Implicit in your review is the recognition that the special provisions must be extended.

Each of us wants to believe that discrimination in voting and elsewhere is a part of this country's past and not its present and future. Unfortunately, the facts do not support this view. To conclude otherwise, is to rely on supposition and wistful thinking. Recognition of this discrimination does not mean, as some wrongly suggest, that we brand communities or individuals racirts. It is simply a recognition that such discrimination must be eliminated. We believe the House amendments will do just that.

Mr. Chairman, this Committee has heard testimony in support of S. 1992 from a long list of outstanding civil rights litigators and constitutional scholars. You have heard from those lawyers who have argued on behalf of minorities seeking relief from the courts for violations of federal voting laws - that list includes Armand Derfner, Laughlin McDonald, Dave Walbert and Frank Parker. You have also heard from the authors of the section 2 amendments, Chairman Rodino and Congressman Sensenbrenner; each has discussed the results the House amendments to sections 2 and 4(a) would have on future cases brought under the Voting Rights Act. Their analysis is based upon the plain lanugage of the statute, the very carefully stated legislative history and the judicial interpretations and application of precedent to section 2-like cases. I wish to associate myself with their remarks.

Other persons with less expertise in voting rights than these gentlemen are alarmed by what could be the results of the House-passed amendments. Yet, their predictions of dire results are based on supposition -- they ignore the plain meaning of the language of the House-passed bill, they disregard the carefully stated legislative history, and they fail to address the extant case law by refusing to present any contrary analysis of this judicial record.

I am confident the fine members of this body will be persuaded by the facts and will ignore what we all recognize are red herrings.

The Subcommittee's review of the continued need for the special provisions of the Act proceeded in 3 stages. Stage one focused on extension of section 5 and the minority language provisions. In stage two we analyzed the section 2 language set forth in H.R. 3112 and bills introduced by Representative Hyde and, throughout our deliberations, we addressed the concerns raised regarding proportional representation. Stage three, considered bailout and that became the primary focus of the full Committee markup. The progression of committee deliberations is evident from the various bills introduced by Representative Hyde. This progression was dictated by the legislation before us and by the interests and concerns of our Subcommittee Members.

Since a number of statements have been made throughout these hearings challenging the adequacy of the hearing record to support the House-passed bill, I will devote the balance of my presentation to the hearing process and the reasonableness of the amendments adopted by the House. The reasonableness of the Amendments is based upon a public record of identifiable and continuous voting violations.

Amendments to Section 2

Shortly, after the Supreme Court's ruling in City of Mobile v. Bolden, civil rights advocates began discussing the implications of the ruling and members of the House Committee on the Judiciary considered drafting legislation to amend section 2. In response, I convened a meeting in May, 1980, of legal scholars, voting rights litigators, and civil rights advocates to discuss the significance of this case in the federal government's responsibility to protect minority voting rights.

The participants offered sound advice. They acknowledged the decision represented a major change in voting rights litigation but suggested we defer legislative action until such time as lower court decisions interpreting this ruling could be analyzed.

In addition, subcommittee staff attended meetings in Atlanta, where southern historians and civil rights lawyers met for the first time to consider the kind of historical research that would be necessary to meet the evidentiary standard set forth in Mobile, and in New York, where civil rights advocates, voting rights litigators, and minority elected officials discussed the gains and continued need for the Act and the impact of the Bolden decision.

Throughout the 18 days of subcommittee hearings, witnesses considered the rights and remedies conferred by the section 2 language set forth in H.R. 3112, as well as the standard of proof it would establish. Thus, the hearing on June 24th represented not simply one day of section 2 analysis but a synthesis of the previous 15 days' review. A majority of the 122 witnesses addressed the section

2 amendment in their prepared statements. In addition witnesses were frequently asked to respond to questions, very often posited by Rep. Hyde, as to the standard of proof established by the amendment, and whether, in their view, it guaranteed a right of proportional representation and/or whether the witness desired to confer such a right. In all instances, the responses were: the amendment would have the result of reestablishing the pre-Bolden standard of proof, i.e., a result/consequence/effect test. As Robert Brinson, city Attorney for Rome, Georgia, noted, the Mobile decision established a difficult burden of proof (House Hearings p. 222); as to the second and third points, the answer was unequivocably, no.

Amendments to the Bailout Provision

Likewise, witnesses were asked throughout the hearings whether the bailout provision should be amended and how. With few exceptions, they advised against any changes. Their recommendations were grounded in a personal knowledge that no covered jurisdictions, in the states familiar to them, had a record of compliance with the letter and spirit of the Act. They reminded the committee that no jurisdiction came forward to present such a record. Instead, the record of minority political gains were shown to be fragile indeed and directly attributable to the Act.

A number of the bailout elements adopted by the House were first recommended by Rep. Hyde. The bailout provision was amended for two reasons: (1) it was believed such a compromise was necessary to secure passage of the bill, and (2) thanks to Mr. Hyde and, in 1975, Mr. Butler, the Committee realized that the purpose of the Voting Rights Act - to assure minority access to the political process - would not be realized unless there was an incentive for rehabilitation.

Each time the Act was extended, it was based upon findings that the following practices and procedures singly and in combination resulted in inhibiting minority voters' participation or in submerging minority voting strength: unreasonably restrictive registration hours/procedures, refusals to appoint minorities to the registration or election process, dual registration requirements, excessive purgings and unlawful voter registration requirements, multi-member legislative districts, at-large county or city-wide voting, majority-vote run off requirements, prohibition on single-shot voting, etc. In addition, persons residing in the covered areas as well as Justice Department records showed the failure of many jurisdictions to comply with the §5 preclearance provisions.

Thus, the ingredients for the amended bailout proposal were spread throughout the record. And it was this record of past and continuing discriminatory practices and procedures, which compelled the House to adopt a two part bailout test.

Under the first part, the jurisdiction is barred from bailout unless it can show that in the ten years preceeding the bailout suit there has been: 1) no literacy test, 2) no final judgments of voting discrimination, 3) no assignment of federal examiners, 4) full compliance with section 5 preclearance, 5) no section 5 objections. These are reasonable factors which assure the Congress that jurisdictions will not be prematurely relieved of their obligations under the Act. They focus on activities which would indicate discrimination is continuing and the ten year showing establishes a genuine record of nondiscrimination.

Under the second part, the jurisdiction must take positive steps to eliminate discrimination. This would include eliminating discriminatory election systems, and making constructive efforts to eliminate harrassment and intimidation of voters as well as to improve registration and voting.

It is a tough bailout and it should be tough because the public record is clear that the covered jurisdictions have failed to voluntarily open the political process to minority participation. It liberalizes the law by allowing counties to bailout. It provides incentives to the covered jurisdictions because their ability to bailout rests on their own action rather than on the passage of time.

Mr. Armand Derfner has provided you with an anlysis of the estimated eligibility dates for most of the covered jurisdictions. All will be eligible in ten years, if they choose to be.

Under the House-passed bill, bailout suits will continue to be heard in the D.C. District Court. Congress reserved such jurisdiction to assure uniformity in interpreting the bailout provisions. The members of the House are persuaded that such reasoning is still sound. Frankly, any suggestion of built-in bias of one or another court is disingenuous and adds nothing to your review.

The jurisdictions that meet this test will have complied with the letter and spirit of the Voting Rights Act of 1965. They will be richer for having opened up their political process.

I urge the Senate to join with the House by adopting S. 1992, so that the purpose of the Voting Rights Act of 1965 will be realized at last.

COUNCIL ON CHURCH AND RACE PHONE: (212) 870-2703

THE UNITED PRESBYTERIAN CHURCH IN THE U.S.A. • 475 RIVERSIDE DRIVE • NEW YORK, N.Y. 10115

November 23, 1981

The Honorable Orrin G. Hatch
United States Senate
Washington, DC 20510

Sir:

The Council on Church and Race, the United Presbyterian Church in the United States of America, has adopted the following statement to be sent to you.

EXTENSION OF THE VOTING RIGHTS ACT OF 1965

A Position Statement of the
Council on Church and Race

At its meeting in Houston, Texas in May, 1981, the 193rd General Assembly of the United Presbyterian Church in the U.S.A. issued a pronouncement supporting extension of the Voting Rights Act of 1965. The Voting Rights Act has been hailed as one of the most effective civil rights laws ever passed. Its passage led to dramatic increases in the political participation of racial/ethnic minorities through the protection of constitutionally guaranteed voting rights. Prior to that time these rights had systemically been denied to large segments of our population. Sharp growth in the number of black and Hispanic elected officials has been noted in jurisdictions covered by the Act.

However, hostility, discrimination, lack of information, difficulties in communication, and open harassment and intimidation continue to present barriers to the full participation of minority persons in the political process. Despite progress made, minorities still constitute a very small percentage of the elected officials in the U.S. Congress, in State legislatures, and in law enforcement positions. Registration and voting rights for minorities lag far behind those for whites. At-large election systems, rules which dilute minority voting strength, jurisdiction boundaries drawn to split areas of minority concentration, and minimal enforcement of minority language provisions present continuing problem. A 1980

"Focal point for the identification of issues and the development of churchwide policy relating to racial and intercultural justice and reconciliation."

court decision (City of Mobile vs. Bolden), which requires proof of discriminatory "intent", rather than discriminatory "result", before disallowing voting procedures has weakened the enforcement efforts of some of the provisions of the Act.

The Voting Rights Act will expire in August, 1982 unless extended by Congress. In October of this year the U.S. House of Representatives passed a bipartisan bill (H.R. 3112) providing for an extension of an undiluted version of the Act until 1992. This bill continues the requirement for provision of bilingual election materials and voting assistance which is strongly favored by Hispanic groups. "Section 5", the provision which mandates Justice Department preclearance of actions by voting jurisdictions which would impact minority voting, was also extended in the bill, and strong and reasonable incentives are provided for exemption, or "bail out", for voting jurisdictions which achieve clean records. The House bill reinforces the Voting Rights Act with language that clearly makes discriminatory effects of voting laws grounds for court challenge, rather than requiring discriminatory intent which is virtually impossible to prove.

We therefore, urge you to support those modifications of the Voting Rights Act which strengthen its provisions for preventing discriminatory action.

Very truly yours,

Virstan Choy vak
The Reverend Virstan Choy
Co-chairperson

Mary Grace Rogers vak
Mrs. Mary Grace Rogers
Co-chairperson

VC/MGR:vak

PREPARED STATEMENT OF ALFREDO GUTIERREZ, MEMBER, ARIZONA STATE SENATE

Mr. Chairman, members of the Subcommittee, My name is Alfredo Guitierrez. I'm very pleased to be here today to convey my support of S.1992, the Voting Rights Act of 1982. I would also like to thank Senator DeConcini personally for his support of this bill and his leadership on the issue. Substantively and symbolically this bill means a great deal to Arizona's Hispanics, Indians and Blacks, who make up 28 percent of the State's population. Our minority citizens feel confident that Senator DeConcini will represent our concern for a strong voting rights bill in the face of intense opposition to many of the bill's key provisions, which are necessary to protect what President Reagan has called, "the crowned jewel of our democracy," the right to vote.

I am, quite frankly, surprised by the controversy surrounding S.1992. The provisions I support and wish to discuss today seem to me the very minimal that Congress can enact and still uphold the 14th and 15th Amendments of our Constitution. Under S.1992, jurisdictions that have been "good" will be able to be released from pre-clearance; victims of voting discrimination will once again have meaningful access to the courts, virtually denied them since the 1980 Supreme Court decision, City of of Mobile v. Bolden; and Hispanic, Asian, Indian and Eskimo voters will be guaranteed bilingual voting assistance until 1992.

Arizona is no stranger to the Voting Rights Act. Parts of our state have been covered under Section 5 preclearance since 1965 because, at that time, we used a literacy test and less than 50 percent of our voting age population was registered or turned out in the 1964 presidential election. We were covered again in 1975, as a result of the language minority provisions, which also required us to provide bilingual voting assistance for Hispanics and, in seven counties, for American Indians.

Arizona does not have a state bilingual election law, and without the federal mandate for bilingual elections, our non-English speaking citizens would be denied their right to vote. I am very pleased President Reagan supports this provision of S.1992.

Testimony submitted during these hearings and during House hearings last year reveals that bilingual elections are an appropriate legal and legislative remedy to guarantee that non-English speaking U.S. citizens be permitted to cast meaningful votes. The testimony showed further that in most areas of the country, the additional cost for providing bilingual election assistance was insignificant. Alternative methods for providing cost effective bilingual assistance are available and have been used successfully in Los Angeles, San Diego and other districts whose normal election costs run high.

Hispanics make up 16.2 percent of Arizona's population and 13.2 percent of our elected officials. Between 1973 and 1980, Hispanic representation at the city and county levels increased significantly. In 1973, there were 57 Hispanic elected officials at these government levels. In 1980, there were 77. Among state elected officials (Governor, Lt. Governor, Senators, Representatives, judges and district attorneys), between 1973 and 1980, Hispanics representation declined from 13 to 12 representatives. During those years, we did not have any Hispanic representation in the U.S. Congress.

Between the 1976 and 1980 presidential elections, Hispanic representation and voter turnout increased impressively. Hispanics increased their registration by 14 percent, or 12,700 voters, between these two elections. They increased their turnout by 25 percent, by 14,288 voters. Yet, only 55 percent of Arizona's eligible Hispanics are registered to vote, compared with New Mexico's 65 percent and Colorado's 60 percent.

Since 1975, the Department of Justice has issued objections to eight voting changes contained in four letters of objection. The Congressional and state legislative redistricting proposals are currently under review by the Department of Justice. The first sixty day period ends on March 7. I understand that a number of Hispanic individuals and organizations have submitted comments to DOJ charging that the plan will have a discriminatory impact on Hispanic voters.

It may be suggested that Arizona's relatively small number of objections is evidence that the state's voting problems are minor and do not require the imposition of federal scrutiny. I reject that conclusion and urge the Senate to reject it. The fact that Arizona has had a small number of objections suggests other circumstances to me: the State has fewer subdivisions than any other fully covered state except Alaska; and the state and its subdivisions pass fewer discriminatory laws than other states because we lawmakers know the laws will be reviewed for their possible discriminatory impact. In other words, the Act has sensitized our lawmakers and discouraged them somewhat from enacting discriminatory voting laws. The Act's deterrant effect at halting discriminatory voting laws may be as significant as the actual Section 5 review mechanism. In this regard, I wholeheartedly agree with Attorney General William French Smith, who praised the Act's deterrant effect in his report to the President on the Voting Rights Act.

I support the continuation of pre-clearance contained in S.1992 with its new bailout provision. The proposed bailout will both protect minority voters and permit jurisdictions with genuinely good records to be released. Detractors have referred to the bailout in S.1992 as "impossible", while some on the other end of the spectrum consider it too loose. I believe the truth is somewhere in between. The bailout is stringent--and it should be. The purpose of Section 5 is to protect minority voting rights. Those who propose to weaken the bailout seem more interested in protecting local election officials from what they consider the "burden" and "stigma" of pre-clearance. The Constitution, the Congress and the Courts have spoken on this issue many times and have concluded that it is the proper role of the federal government to protect citizens from denials or abridgments of their right to vote. Local election officials who consider this a "burden" do not have my sympathy. I urge this Subcommittee and the Senate to focus it attêntion on the problems of minority voters rather than the cries from local election officials.

I understand that during a recent hearing Senator DeConcini raised the issue of state responsibility for its subdivisions and questioned the need for one of the bailout criteria. The proposed bailout would permit a fully covered state to bailout only when all of its subdivisions could meet the bailout criteria--though, it should be noted, not all of the smaller units must have actually bailed out. Senator DeConcini brought up an example in which a state would be kept under Section 5 solely because of the recalcitrance of one of its smaller political subdivisions and suggested, from what I understand, that the requirement might be too stringent.

As a state legislator, I believe that standard is not only reasonable but necessary to insure that minority voting rights are protected. To a very great degree, states determine the electoral practices and proceudres of their counties, cities, school districts, water districts, sanitary and hospital districts.

The Arizona Revised Statute Title 16 is the state election code. It is developed by the State Legislature; it is amended frequently for both administrative and substantive reasons. It specifies how and when elections are to be conducted for virtually every governmental unit in the state. It specifies, for example, that the state's more than 200 school boards must be composed of 3 or 5 members whose terms alternate and that they must be elected on a non-partisan basis from the entire school district. The election code specifies when elections must be held for fire, sanitary and road improvement districts, as well as for the Central Arizona Water District Board.

It is exclusively within the power of the state government to specify standards and guide the electoral practices of even the smallest of governmental units. To suggest, therefore, that the state should be permitted to bailout when its subdivisions are not clean is to absolve the state of its exclusive responsibility and to nullify the relationship between the state and its political subdivisions. As a state legislator, I urge the Senate to acknowledge the reality of this unique relationship, and to retain this important bailout standard.

I would like to turn now to Section 2 of the Voting Rights Act. I fully support the amendment to this section which would prohibit electoral practices and procedures which would "result in the denial or abridgment" of the right to vote on account of race, color or membership in a language minority group." Again, I am pleased that Senator DeConcini has endorsed this vitally important provision. I am confident that his support of this amendment will help to insure its passage by the Senate.

I would like to limit my discussion of this complex issue to three parts: 1) The pre-Mobile standard; 2) Congressional authority to amend Section 2 , and 3) My experiences as a state legislator which lead me to conclude that any 'intent' standard for voting lawsuits is unreasonable and will not safeguard the voting rights of minorities.

The Subcommittee has heard a great deal of testimony on the "results" standard which S.1992 would codify into law and thus restore the standard that was used in voting litigation prior to the 1980 Supreme Court decision, City of Mobile v. Bolden. I reject the assertions that this is a new untested standard and refer the Subcommittee to the testimony of Frank Parker on February 11 and his analysis of 23 lawsuits decided between 1972 and 1978. The conclusions of Mr. Parker's testimony deserve reiteration. They forcefully and unequivocally rebut charges made by detractors of S.1992, including the Attorney General of the United States.

1) The results standard will not lead to a finding of a Section 2 violation because of lack of "proportional representation" and one other "scintilla of evidence."

2) the results standard will not lead to court-ordered "proportional representation"; under the results standard proportional representation or racial quotas were repudiated in every case.

3) The results standard will not open "floodgates" to litigation. Under the results standard between 1965 and 1980, few lawsuits were brought nationwide and still fewer won by minority voters. In other words, the results standard does not mean automatic victory for minority voters.

I am not a lawyer and I am not a Constitutional scholar; I leave the fine points of legal analysis to attorneys at the Mexican American Legal Defense and Educational Fund, the Southwest Voter Registration Education Project, and others who have worked vigilantly to represent minority citizens whose right to vote has been denied or abridged.

Though I am not a lawyer, I am quite familiar with the 14th and 15th Amendments of the U.S. Constitution which empower Congress to enact appropriate legislation to ensure full enjoyment of the rights protected by those amendments. I believe that the Section 2 amendment in S. 1992 is such an appropriate use of Congressional power.

To those opponents of this amendment who will respond that Congress does not have the authority to mandate "racial quotas in elections" or "proportional representation" I can only refer you again to the findings of the experts: there is no basis in fact, and in the 15 year history of vote dilution cases decided prior to 1980, to support this allegation. I would not presume to ascribe a motivation or "purpose" to those who oppose this amendment. I will limit myself to the tangible, objective results or effect of their opposition: an intent test will deprive minority citizens of meaningful access to the courts that is promised them under the Voting Rights Act.

The motivation of lawmakers in passing laws is not only irrelevant but highly imprecise. In my almost ten years in the Arizona Senate, I have witnessed legislators publicly and privately express their reasons for taking certain actions. Their motivations are most often quite honorable but there may nonetheless be a wide divergence between what they say in private and what they say in public. All of us in public life know that and live by it. How then is a court supposed to determine the "motivation" behind the enactment of a particular law? And whose motivation is to be judged? My own? my colleague's? How can the motivations of a diverse group of people be determined with any accuracy? Indeed, how can the motivation of one person be determined with any accuracy? My life holding public office forces me to conclude that any standard requiring proof of motivation in voting lawsuits is seriously flawed and should be roundly rejected.

Voting practices should be examined based on objective criteria, such as a history of discrimination, racially polarized voting, the existence of discriminatory methods of election, and exclusion of minorities from the political process. To protect a right as fundamental to our democracy as the right to vote, Congress should adopt a standard--in existence between 1965 and 1980--which will provide equitable and fair relief for minority voters. To do less would be for Congress to shirk its responsibility to uphold the Constitution.

Thank you.

PREPARED STATEMENT OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES

The American Federation of State, County and Municipal Employees (AFSCME), a labor union representing more than one million public employees nationwide, takes this opportunity to endorse S.1992, which extends and makes amendments to the Voting Rights Act of 1965.

The Voting Rights Act (Act) is clearly one of the most important and successful Civil Rights laws ever passed. Though the 15th Amendment of the Constitution prohibits the denial or abridgement of the right to vote on account of race, color, or previous condition of servitude, years of litigation proved this basic right, in actuality, did not exist. Numerous devices continued to deliberately exclude blacks from politics and voting. Only since the historic march in Selma, Alabama, led by Dr. Martin Luther King, which visibly brought to light the discrimination and harassment encountered by black people who desired access to the voting booth, have we witnessed a dramatic increase in minority registration and voting. Since that march in 1965, the number of black registered to vote in South Carolina, Alabama, Mississippi, Louisiana, Georgia, Virginia and parts of North Carolina, has doubled. In Mississippi specifically, from 1870 to 1965, blacks brought cases in Court under the 15th Amendment to exercise their right to vote. Litigation proved fruitless and is evidenced by the fact that in 1965, the Mississippi Freedom Party documented that only approximately 6 percent of the black voting age population in Mississippi was registered to vote. However, since 1965 and the enactment of the Voting Rights Act, the burden of proof is on the jurisdiction to show lack of discrimination and the registration of Black Mississippians increased by 1976 to 67.4 percent...and this is in only 11 year. We think there is legitimate reason to fear that there would be resurgence of the discriminatory tactics practiced by government officials in Mississippi for 95 years if the Voting Rights Act is not extended. The record in Mississippi before and after the Voting Rights Act speaks for itself. Moreover, since the Act was extended in 1975 to Hispanic-Americans and other language minorities who were victims of similar discriminating voting practices as had been applied to blacks, Hispanic registration has increased by approximately 30 percent nationwide and approximately 44 percent in the Southwest. The dramatic increases in voter registration and participation have, in essence, guaranteed minorities the right to cast not only a ballot, but an effective ballot. The Act has provided minorities, who were once disenfranchised from the electoral process, a voice in the political decisions that affect their lives.

The increase in black elected officials can also be attributed to the success of the Voting Rights Act. A 1980 survey of black elected officials, carried out by the Joint Center for Political Studies revealed that blacks, for the first time, held one percent of the approximately 490,200 elective offices in the country. And it has been documented that over half of these officials are in states covered by the Act. Black elected officials have made meaningful contributions to the political and electoral process and have influenced policy decisions. Additionally, the fact that minorities hold elective office has, in my opinion, enchanced government by providing another voice to address the distribution of public benefits. The fact that a broader base of representation exists, works to improve the well-being of the community and all of its residents.

The increase in minority voter participation and the increase in black elected officials, however, does not negate the necessity of the Voting Rights Act. While the Act has eliminated such discriminatory practices as the poll tax and literacy tests, more subtle schemes, such as shifting to at-large elections, shifting from election to appointment of public officials, polling place changes, redistricting, majority runoff requirements, racial gerrymanders, and discriminatory annexations, have emerged. These changes in local voting laws often dilute minority voting strength so that, despite a large minority voter turnout, the minority vote will not have an effect. Weakening the Act's protections would allow discriminatory schemes to flourish and eliminate the participatory gains that have been achieved.

A good example of where the Voting Rights Act (Section 5) has halted a discriminatory voting scheme was Richmond, Virginia. Richmond has always used the at-large system for elections. However, when in 1970 the City developed a majority black population, a decision was made to dilute the black voting strength by annexing portions of a suburban, white county. The Justice Department objected to the annexation and ruled that the annexation could be retained only if the City adopted a single-member district plan in stead of the at-large system. The case was appealed and after the 1970 elections, the Supreme Court enjoined all City Council elections until litigation was completed in 1977. Since 1977, Richmond has a nine-member City Council, five of whom are black. Richmond now has a black mayor.

I raise the Richmond case because of AFSCME members' involvement in the 1977 elections. It was the first time that the nine ward plan had been used. The issues were clear and similar to concerns in other municipalities: the need for more inner-city industry, rising real estate taxes, quality education, better police protection, etc. But the black residents of Richmond wanted their voice to be heard on these issues too. And it was. Our members most important role was to urge City residents to vote for the candidate of their choice. The results of the election reveal the choices of the people of Richmond.

AFSCME is particularly interested in the extension of the Voting Rights Act and casting an effective vote because of the nature of our organization...we represent public employees. AFSCME's Constitution points out that: "For unions, the workplace and the polling place are inseparable..." Public employees -- more than any other group -- know that their well-being and the quality of services they perform are strongly affected by who holds public office. AFSCME members realize that basic services that are often taken for granted...such as well paved roads, environmental and sanitation services, the availability and quality of care in public hospitals...are decided by local and state officials. Our members also realize that those who participate in voting can affect the actions of government. For this reason, our members are politically active, and volunteer their services for various political activities. Declining voter turnout, which was evidenced in the last Presidential election, reveals the continued need for greater involvement by the public in the political arena. AFSCME believes that the Voting Rights Act will continue to play an important role in increasing the voter registration and participation levels. Moreover, we believe the Act has, and will continue to bring about social progress in electoral politics that is necessary for the healthy development of this society and our democratic form of government.

The United States has a representational form of government which is based on democratic principles embodied in the Constitution. Voting is one of the most basic constitutional rights, however, history has shown that the fundamental right to vote, for many Americans, was not guaranteed. Moreover, present day attempts to make discriminatory changes in voting and election procedures reveals the continued need for the Voting Rights Act. For this reason, AFSCME disagrees with opponents of the Act who argue that it is no longer needed and that is is regionally punitive. We believe that the Voting Rights Act has proven to be effective in making the right to vote a reality and that, because of the Act, a more representational government now exists...a government of, by, and for the people. AFSCME urges the members of this body to support S.1992, as drafted.

PREPARED STATEMENT OF THE NATIONAL LEAGUE OF CITIES

The National League of Cities, which represents 15,000 cities through direct membership or membership in our affiliated state municipal leagues, strongly supports extension of the Voting Rights Act. The continued existence of governmental practices that deny the right to vote to many citizens is evidence that the Voting Rights Act should be extended and strengthened.

Cities have a vital and continuing interest in the development, maintenance, and extension of vigorous and effective civil rights policies. Strong civil rights laws guarantee that citizens have the right to equal representation. Without such a right, public services and benefits are not likely to be distributed on an equitable basis.

Since adoption of the Voting Rights Act in 1965, the registration and voting rates for minorities have increased dramatically and the number of minority elected officials has increased significantly. However, numerous practices and procedures are still used to prevent full participation of minorities in the electoral process and in government. The inability of minorities to participate fully in government can adversely affect minority communities in many ways, including the following: (1) minorities may receive fewer and lower quality governmental services; (2) undesirable governmental facilities, such as garbage dumps, may be located in minority areas; (3) the minority community frequently is not provided with equal health and safety (especially police and fire) services; (4) the minority community often does not have equal access to parks, recreational, and cultural facilities; and (5) minorities may not have a proportional share of local government employment.

Shifts from elective to appointive office, racial gerrymandering, redistricting, at-large elections, and annexations are some of the devices which have been used to prevent the election of minority officials. Inconvenient location and hours of registration, frequent purgings of registration lists and complicated reregistration requirements, refusal to appoint minority registration officials, and dual registration requirements for county and city elections are some of the governmental practices which act as barriers to minority registration and voting.

We urge the Subcommittee to extend the Voting Rights Act with the following three provisions: (1) establishment of an effects rather than an intents test for Section 2 court challenges to discriminatory election procedures; (2) extension of the preclearance requirements of Section 5 and adoption of a permanent bailout procedure for covered jurisdictions; and (3) extension of the bilingual election requirements of Section 203 through 1992.

I. Establishment of an effects test

Section 2 of the Voting Rights Act, a permanent provision of the law which applies nationwide, prohibits voting practices and procedures that deny the right to vote to a person because of his race or color. We urge the Subcommittee to amend Section 2 of the Act to require proof of discriminatory effects, rather than discriminatory purpose or intent, in cases brought under this provision. This change is necessary to provide a mechanism for challenging the legality of voting and election procedures which are not subject to the law's preclearance requirements, either because they existed before the Voting Rights Act was first adopted in 1965 or because they arise in jurisdictions not covered by Section 5.

The Supreme Court, in City of Mobile v. Bolden, 446 U.S. 55 (1980), ruled that a voting practice or procedure violates Section 2 only if its adoption was motivated by discriminatory intent. NLC urges the Subcommittee to restore the pre-Bolden effects test to Section 2. The courts should be allowed to consider the discriminatory voting practice in determining whether the law was violated. The intent or motivation of the officials who approved the change is difficult to prove (and may be impossible to prove if the officials who adopted the change are dead). The effects test is more objective and practical: evidence that elements of an electoral system are discriminatory and that voting discrimination is an historical fact should suffice to establish a violation of Section 2. In contrast, the intents test is a highly subjective and impractical test: evidence of a discriminatory purpose or motivation on the part of the officials who established the procedure or requirement (evidence of legislative purposes is frequently nonexistent) would be required to comply with this standard. The remedy provided by Section 2 will become an empty promise for victims of voting discrimination if they are required to meet an impossible test--proof of intent.

The proposed amendment to Section 2 includes language explicitly stating that the law does not create a right of proportional representation. Thus, the amendment would simply outlaw conduct which has the effect of discrimination on the basis of race, color, or membership in a language minority group.

II. Extension of preclearance requirements and adoption of a permanent bailout procedure

Section 5 of the existing law, scheduled to expire on August 6, 1982, requires that jurisdictions with a history of voting discrimination submit all electoral changes for preclearance to the Justice Department or the District Court for the District of Columbia. Section 4 of the Voting Righst Act establishes triggers for determining whether a jurisdiction is covered. Nine states and portions of 13 others are subject to preclearance requirements based on their use of exclusionary tests or devices (the use of English-only election materials in 1972 in jurisdictions where a single language minority group comprised more than 5 percent of the voting age population was also deemed an exclusionary test or device) in 1964, 1968, and 1972 and voter registration or turnout votes of less than 50 percent in 1964, 1968, and 1972. We urge the Subcommittee to adopt the preclearance requirements and the new bailout procedure proposed in S. 1992.

The preclearance procedures of existing law are a proven and effective tool for preventing discriminatory voting practices and procedures in those jurisdictions with a history of discrimination. Such an extraordinary remedy as preclearance is justifiable because it protects the most fundamental right in a democratic society--the right to vote. Litigation--because of the cost and time involved--cannot guarantee the timely protection of voting rights.

The bailout procedures proposed in S. 1992 will enable those jurisdictions, which are subject to preclearance requirements, to terminate their preclearance obligations. We believe that the bailout procedure is fair and equitable: it gives covered jurisdictions an incentive to involve minorities in their political processes, but does not permit termination of coverage until an adequate record of compliance is established. Under the bailout procedures of S. 1992, which would become effective on August 7, 1984, a covered jurisdiction (the political subdivisions of a fully covered state are explicitly allowed to bailout independently of the state) could bailout by obtaining a declaratory judgment from the District Court for the District of Columbia.

A declaratory judgment for bailout will be awarded if the jurisdiction proves that it (and its subunits) have met the bailout standards for the 10 year period preceding the filing of the suit. The declaratory judgement will be granted if during these 10 years: (1) the jurisdiction has not used exclusionary tests or devices; (2) the federal courts have not entered a final judgment against the jurisdiction for having violated the voting rights law; (3) the Federal Government has not assigned any federal examiners to the jurisdiction; (4) the jurisdiction has fully complied with the preclearance requirements of Section 5 (e.g., the Justice Department has not objected to the proposed changes); and (5) the jurisdiction can establish that its voting procedures are nondiscriminatory and it has expanded opportunities for minority participation.

The bailout procedure provides a reasonable and equitable method for jurisdictions to terminate their preclearance obligations. We strongly urge the Subcommittee to adopt these criteria as the bailout standards.

III. Extension of the bilingual election requirements through 1992

Two provisions of the existing law have significantly increased the participation of language minorities in the electoral process. First, jurisdictions are subject to special provisions (i.e., Section 5 preclearance, and Section 6 and 8, authorizing the case of federal examiners) if they used English-only election materials (when more than 5 percent of the voting age population are members of a single language minority group) and registration or voter turnout was less than 50 percent in 1972. (This requirement was discussed in Section I of this statement.) Second, jurisdictions must provide language assistance when members of a single language minority group make up more than 5 percent of the voting age population and their illiteracy rate is higher than the national rate. This provision is scheduled to expire in 1985.

We urge extension of the language assistance provisions of Section 203 of the Voting Rights Act through 1992. Availability of language assistance (e.g., bilingual ballots and instructions) guarantees the integration of language minorities into the political process and insures a more democratic society.

IV. Conclusion

We urge the Subcommittee to approve a voting rights bill that will provide long-term protections for the right to vote, the most fundamental right in a truly democratic society. We believe that S. 1992 includes three critical provisions: (1) an effects (rather than intents) standard of proof for court challenges to discriminatory election procedures; (2) extension of the preclearance requirements and adoption of a permanent bailout procedure; and (3) extension of the bilingual election requirements through 1992. Without these three provisions, the voting rights laws will be a less than adequate protector of the most basic constitutional right.

As city officials, we believe that passage of a strong voting rights law is necessary to guarantee democratic governments. City governments are not likely to respond to the actual needs of their citizens if artifical barriers prevent full participation in the electoral process by all segments of society. A society will not be stable and democratic if its citizens are unable to participate fully in government through the electoral process. The importance of protecting this constitutional right cannot be underestimated and more than justifies the extraordinary protections of the existing Voting Rights Act and the amendments proposed in S. 1992.

PREPARED STATEMENT OF DOUGLAS A. FRASER, PRESIDENT, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

This statement contains the views of the United Auto Workers in strong support of S. 1992, legislation to extend the Voting Rights Act of 1965. S. 1992 is identical to H.R. 3112 which passed the House on October 5, 1981, by the overwhelming and bipartisan vote of 389-24.

The protections contained in the Voting Rights Act and in H.R. 3112/S. 1992 are designed to assure the most fundamental American right of citizenship--the right to vote. It is altogether fitting and proper that the House vote on H.R. 3112 was bipartisan and so overwhelming.

My statement reflects the strong consensus on this issue of UAW leadership and membership. We join numerous organizations affiliated with the Leadership Conference on Civil Rights and concerned Americans everywhere in support of S. 1992. This bill will help to guarantee continuation of an open-door policy which will permit more of our citizens to vote.

Those who are familiar with American history are aware of devices and tactics that have been used to keep black people from voting. In addition to literacy tests, there have been violence, irregular registration hours, loss of jobs, reprisals, evictions, loss of credit, and many other forms of intimidation to keep black minority citizens from exercising their right to vote.

The following incidents occurred during peaceful efforts to register blacks in Alabama in 1965, before the Voting Rights Act became law:

- February 18, 1965 - Jimmie Lee Jackson, a Selma black, was shot in the stomach and clubbed in the head by Alabama State Troopers, according to his own statement. He died February 26, 1965.

- On March 7, 1965, Alabama State Troopers, under orders from Governor George Wallace, used tear gas, nightsticks, and whips to halt a march from Selma to Montgomery, the state capitol. About 40 persons were severely injured in this march in support of voting rights.
- A white Unitarian minister from Boston, James Reeb, 38, died March 11, 1965, of skull fractures caused by white men who clubbed him in the head on March 9, 1965, in Selma.

It was violence of this nature that caused Congress to act and pass the Voting Rights Act which President Johnson signed into law on August 6, 1965. The UAW was among the earliest and strongest supporters of this legislation. We continue totally committed to its objectives today in advocating enactment of H.R. 3112/S. 1992 without delay.

We believe that if the Act is not extended, intimidation and retaliation on a large scale could return.

A recent federal study determined that there were 23 million Americans, age 16 and over, who were functionally illiterate. The study further indicated that 26 million citizens could not pass the written requirements of a driver's test, nor could they complete a job application. Many could not even read the "help wanted" ads. The study did not conclude, however, that these millions could not exercise their right to vote with prudence and good judgment. While the educational system may have failed these individuals, the political system must not compound this injustice by denying their constitutional rights. It is essential, therefore, that Section 4 and Section 201 of the Voting Rights Act, which ban literacy tests nationwide, be continued.

We must restore Section 2, as provided in S. 1992 to the original understanding before the 1980 Mobile v. Bolden U.S.

Supreme Court decision. That decision held direct evidence of specific discriminatory intent must be proved in order to demonstrate a violation of Section 2. Shifting to this intent test, which is almost impossible to prove because of its subjective nature, instead of looking at the "totality of circumstances" standard set forth in the White v. Regester decision amounts to "stacking the deck" against those who are the victims of discrimination. The provisions of H.R. 3112/S. 1992 are directed at this problem, and any effort to dilute them should be rejected out of hand.

It should be noted that the Act, under the White standard, did not result in a large number of court cases. In fact, between 1965 and 1980, there were less than 20 reported cases involving Section 2 litigation; also, the proposed Section 2 would not mandate proportional representation. To eliminate any doubt regarding the matter, a proviso was inserted which expressly states that Section 2 does not require quotas or proportional representation.

America has yet to fulfill completely the basic constitutional guarantee of providing every America, regardless of race or color, the right to register and vote. It is essential that we make good on the century-old promise of the 15th Amendment. Is it asking too much today that every American, regardless of race, color, creed, sex or national origin, have the opportunity to participate in the democratic process of registering and voting?

We are indeed in critical times in our nation, with widespread disenchantment regarding the gap between principle and practice in our society. What the Senate does now with respect to extension of the Voting Rights Act can contribute substantially to restoration of faith in the democratic process.

As you know, the pre-clearance provisions of Section 5 of the Act are scheduled to expire after August 6, 1982. We believe that any change in voting or election procedures that could have the potential for discriminating against minority voters in covered states require pre-clearance under Section 5. We all recognize that shifts from literacy tests to racial gerrymandering, discriminatory at-large elections and other methods of manipulating the election system and diluting the votes of minority voters continue. New and more sophisticated methods have emerged for diluting the minority vote through such practices as discriminatory annexations, switching from election to appointment of public officials, polling place changes and others designed to nullify or dilute the minority vote. Section 5 will continue to play an important role in curbing such abuses.

It is clear Section 5 has had a significant impact in covered states where the percentage of black and Hispanic citizens has increased with respect to both registration and voting. It can further be demonstrated by the increased number of elected minority officials, which would not have been possible without Section 5.

According to the National Coalition on Voter Participation, some 11% of the 160 million eligible voters in America are black. Blacks constitute 16.8% of the southern electorate, more than is found in the other regions of America. Approximately 60% of the almost 5,000 black elected officials are in states covered by the Voting Rights Act.

Voter registration figures indicate the number of blacks registered to vote in southern states covered by the Act has doubled since 1965. Voter registration information indicates Hispanic registration has increased by 30% nationwide and 44% in the Southwest since passage of the 1975 amendments to the Act.

We are aware that there are those in the Senate who propose the elimination of Section 5 of the 1965 Voting Rights Act. Others would like Section 5 applied to all the States, but we in the UAW believe that the Section 5 provisions are proper and essential as they are. They should be retained.

Let us examine the rate of the Attorney General's objections to discriminatory voting law changes. We believe the statistics demonstrate that the protection of the Voting Rights Act is as important today as when it was first enacted.

During the ten-year period between 1965 and 1975, the Attorney General lodged 404 objections to proposed election law changes.

The 1970 and 1975 amendments to the Act expanded preclearance provisions to include all or part of 22 states, including portions of California, Connecticut, Massachusetts, Michigan, New Hampshire, and New York.

Since 1975, when Section 5 coverage was expanded geographically, another 411 objections have been lodged. The Justice Department since 1975 has initiated or intervened in 53 Voting Rights Act lawsuits and has been defendant in another 39.

The pre-clearance requirement properly applies to those areas of the country where there have been problems with voting discrimination because of the use of literacy tests and other discriminatory procedures which have resulted in extremely low rates of registration and voter turnout.

We believe the fact that the Attorney General has lodged more than 800 Section 5 objections to discriminatory voting law changes in those areas since the enactment of the Act indicates there are still serious problems in covered areas.

Expansion of the Act to cover all 50 states, as advocated by some, would not be cost-efficient since it is presently estimated that the staff needed to handle the increased volume of election law submissions would quadruple. The paperwork alone would obviously be burdensome and be counter to appeals for less bureaucracy. It would also divert attention and resources from the areas where the problems are most acute.

Those who wish to expand Section 5 to cover the entire country may not be fully aware that Section 3(c) of the preclearance requirement may be imposed in any state or political subdivision not presently covered under Section 5. Section 3(c) may be applied to any state in the event a Federal District Court finds a violation of the 14th or 15th Amendment.

The fact that this provision has seldom been invoked demonstrates that the present coverage of the pre-clearance requirement has been appropriately tailored to meet the need.

Looking at the approximate 35,000 election law changes submitted for federal pre-clearance under Section 5 of the Act and the fact that the Attorney General has objected to about 2%, or 815, has resulted in suggestions that the Act may no longer be necessary. This is not a proper conclusion.

In the first place, most state and local governmental units covered by Section 5 are aware of the requirement and are deterred from proposing changes that they know would be objectionable under Section 5.

Were it not for the federal pre-clearance requirement, over 800 lawsuits would have had to be filed by the Justice Department or private plaintiffs to obtain relief from discriminatory voting law changes. The cost of enforcing Section 5 is low compared with the cost of lawyer time, court time, litigant time and money which litigation to remedy these changes would have required.

We believe that the federal pre-clearance procedure is one of the most simple and expeditious administrative procedures provided by the Federal Government. A covered state or political subdivision must show that voting law changes are not discriminatory in purpose or effect, either to the Attorney General or the District Court for the District of Columbia. For example, when changes are submitted to the Justice Department, there are no forms to fill out and no formal hearings or presentation of witnesses. All the proceedings can be conducted by phone or mail. It is surprising that many of the proponents of less government are proposing more red tape and bureaucracy.

In response to those who feel a new "bailout" mechanism would be appropriate, the House-passed bill and S. 1992 do in fact provide for a fair, reasonable and achievable bailout provision that would take effect in 1984. The safeguards under the bailout provisions would require the covered jurisdiction to meet certain standards to assure compliance with the Voting Rights Act before it could be exempted from the Section 5 requirements. We believe the bailout safeguards contained in S. 1992 are reasonable and yet assure adequate protection for minorities within covered jurisdictions.

The 1975 amendment under Section 203, requiring that certain states and local jurisdictions provide assistance in other languages, must be extended intact. We recognize that in some areas of the nation hostility exists towards Hispanics, Native Americans and other U.S. citizens, resulting in the inadequate enforcement of the bilingual election process. Bilingual elections have opened up the process to many first-time voters.

We believe that Section 203 should be extended seven years as proposed in S. 1992, from 1985 to 1992, to assure uniform protection. If the Voting Rights Act provisions are not extended, Blacks, Hispanics, and Native Americans, now registered, would in many cases follow the path of retrogression, for the process of reregistering would amount to a screening of present registrants through the mill of exclusion.

We are disappointed that the Justice Department has attempted to weaken the provisions of the House-passed voting rights measure. It appears that it did not thoroughly review or chose to overlook the record of hearings in the House closely. That record emerged from three months of comprehensive hearings which demonstrated the need for H.R. 3112 as passed by the House last fall.

President Reagan has stated on numerous occasions that he does not want to dilute the effectiveness of the Voting Rights Act, yet he chooses to follow the Justice Department and others in advocating amendments which would, in our judgment, jeopardize the voting rights of many Americans.

Now is the time to demonstrate without question that our nation is committed to protecting the voting rights of all Americans.

The present activities by domestic terrorists like the Ku Klux Klan and the American Nazi Party, in reviving racial polarization and violence, make it even more critical that Congress reauthorize the Voting Rights Act of 1965 and that it do it without delays or any weakening amendments.

Any backward move would be a signal to domestic terrorists to increase those acts of violence that have marked their past. Such a signal would translate into a dangerous message not only to citizens protected by the Voting Rights Act, but it would tell the world that the U.S. government is not totally committed to protecting the voting rights to each and every citizen.

The Voting Rights Act of 1965 is an important, lasting product of the civil rights movement of the sixties. It was through the dreams and blood of such leaders as Dr. Martin Luther King, Jr., President John F. Kennedy, President Lyndon Johnson, who risked their very lives--and in some cases, lost their lives--to ensure the civil rights of minorities that the 1965 Voting Rights Act became a reality.

President Reagan stated on November 6, 1981, "The right to vote is the crown jewel of American liberties, and we will not see its luster diminished." It is that luster that the voting rights legislation is designed to protect and enhance.

We are encouraged that 62 Senators--Democrats and Republicans have joined Senators Kennedy and Mathias in cosponsoring S. 1992. This bipartisan expression, coming on the heels of the over-whelming support Republicans and Democrats gave to H.R. 3112 in the House, gives us hope that the Congress will act responsibly on the legislation to extend the Voting

Rights Act which, when all is said and done, is designed to protect the most fundamental of all our civil rights--the right to fully participate in our democratic process by exercising the franchise.

We urge that S. 1992 be adopted without any amendments and that it be done without delay. The country and its citizens need this message. The Congress must respond.

We appreciate the opportunity to have shared with members of the Committee on the Judiciary the views of the UAW in strong support of S. 1992. Thank you.

PREPARED STATEMENT OF LANE KIRKLAND, PRESIDENT, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

The American Federation of Labor and Congress of Industrial Organizations, a federation of 101 national and international unions representing more than 13,500,000 working women and men across the United States, has supported the Voting Rights Act both during the effort in 1965 to enact the law and on each of the subsequent occasions when perfecting amendments have been adopted. We now strongly endorse S. 1992, and urge this Subcommittee, the full Committee, and the full Senate to promptly act favorably upon it.

We cannot ignore our failure for nearly a century to end the discriminatory denial of citizenship rights, or pretend that in fifteen years we have restored the situation to what it would have been had there been no discrimination, or had there not been a long-term failure to correct that wrong. Our national history, and its inevitable lingering consequences, made this Act necessary and make its continuation essential.

In 1870, after brutal struggle, we amended our Constitution to provide that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." In addition to enunciating that profound principle, the Amendment specifically authorized the Federal Government to enforce that principle through appropriate legislation. And Congress was not slow to take up the task. In that same year actions which obstruct the exercise of the right to vote, whether by private persons or public officials, were made a crime, and a year later Congress provided for detailed federal supervision of the electoral process.

But, as we all know, times and concerns changed, and denial of the franchise became a way of life in parts of the country. For 95 years, the promise of the Fifteenth Amendment was honored in the breach, and this despite a long series of court decisions striking down particular discriminatory practices and despite actions by the Congress in 1957, 1960 and 1964 designed to facilitate court enforcement. And so, as the Supreme Court summarized the Congressional purpose shown in the legislative history of the 1965 Act:

> The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which had infected the electoral process in parts of our country for nearly a century. Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. *** Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment. [South Carolina v. Katzenbach, 383 U.S. 301, 308, 309, upholding the Act's constitutionality.]

The law that emerged met the classic tests of sound governance. Congress acted in accord with and to advance our highest ideals. That action was in response to clear and convincing evidence of a need to act. The present means for meeting that need were adopted only after more conventional alternative means were tried and found wanting. Even then the legislature acted with circumspection. Section 5 of the Act, the "sterne[st]" of its provisions, applies only to jurisdictions in which there were barriers to exercising the franchise that in fact affected the extent of voter participation. Finally, the framers of the 1965 Act took pains to devise an enforcement system that is simple and speedy. Under Section 5, the heart of the Act, a covered jurisdiction sends to the Attorney General a copy of the voting law that jurisdiction wishes to follow and material on the law's purpose and effect. The Attorney General must reply within 120 days; if his response is that the law meets the Act's requirements, that is the end of the matter; if not, the jurisdiction may seek a declaratory judgment from the federal courts. That is an example of administrative efficiency that meets the standards of the sternest critics of government.

S. 1992 extends the law so as to continue the work not yet completed of providing a full and fair opportunity to minority voters to participate in the political process. In so doing, the bill makes two changes in the present text that we believe to be salutary.

One of these is the amendment to Section 4 of the statute to add a new "bail-out" provision. Under this amendment, any covered jurisdiction that has truly determined upon a course of nondiscrimination and has taken positive action to stimulate minority voter participation may have itself removed from coverage of the special provisions of Section 5. We are impressed by the argument that the statute should contain encouragement to covered jurisdictions to adhere scrupulously to their obligations under the Act and to reform their election methods and procedures. The amended language of Section 4(a) provides that incentive and details what a covered jurisdiction — whether State or county —must do to be out from the preclearance procedure.

There have been statements by some that the new bail-out provision of S. 1992 is overly demanding and will be impossible to meet. To the contrary, in our view, its provisions are rational and clear and would cleanly distinguish between those jurisdictions that have conformed to national policy in this area and those which, because they continue to discriminate, ought not be released from Section 5 requirements. The best informed projection is that under this amendment a very substantial proportion of the presently-covered jurisdictions should be able to bail out from the preclearance requirements upon the effective date of the amendment in 1984 —some one-quarter of all of the counties now covered. If this comes to pass, it will demonstrate the truest success of the Voting Rights Act. Overwhelming bipartisan majorities in the House rejected every effort to amend the new bail-out language contained in S. 1992, and we commend that course to this Subcommittee.

The second textual change worked by S. 1992 is the amendment to Section 2 of the Act. Section 2 as amended would bar voting qualifications, prerequisites to voting, standards, practices and procedures that are imposed or applied "in a manner which results in a denial or abridgement of" voting rights on the basis of race, color, or language minority status. This amendment serves the sound office of conforming Section 2 to Section 5 of the Act. Section 5 as it stands bars such voting rules having the effect of denial or abridgement of the same rights, on the same bases, when a covered jurisdiction makes a change in its laws. We think it sound legislative practice to treat the same conduct in the same way throughout a statute.

In this connection it is essential to understand what amended Section 2 does not do. The explicit language of the final sentence of the amended Section states "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section." Given that language, we do not understand the claim that the bill requires proportional representation, or, as some have asserted, requires quotas in the composition of elected bodies.

Finally, it has been suggested that those who support the Section 2 amendment are inconsistent in their approach to congressional action concerning matters on which the Supreme Court has spoken. One cannot, the argument goes, support this amendment which would reverse the reading a plurality of the Supreme Court gave to Section 2 in the Mobile case, while at the same time opposing bills such as those now before the Judiciary Committee which would limit or remove federal court jurisdiction to enforce Supreme Court decisions interpreting the Constitution with respect to racially segregated schools. This simplistic argument overlooks the decisive difference between the power of the Legislative Branch concerning legislation and its power concerning Constitutional rights. There is no inconsistency whatsoever between our strong support for the Section 2 amendment and our equally strong opposition to the other bills in question. In the decisions that are sought to be overridden by the court jurisdiction bills, the Court was interpreting the Constitution. There the Judicial Branch is the ultimate authority, and a Supreme Court ruling may be overridden only by a Constitutional amendment. In the Mobile case, the Justices were not interpreting the Constitution but, rather, were setting forth what they understood to be the meaning of an Act of Congress. Where that is the issue, the final authority is the Congress, which is always free to clarify or to change federal statutory law.

It is not surprising that there is near universal agreement that the Act has been the most successful of this country's civil rights laws. Blacks and the language minorities protected by the bilingual provisions are now participating in political life in greatly increased numbers, both as voters and as candidates. But that relative success does not mean that our nation has reached a state of grace. Much remains to be done. S. 1992 will provide the means for further accomplishment. We urge its prompt adoption.

PREPARED STATEMENT OF THE UNITED STATES CATHOLIC CONFERENCE

This testimony on the Voting Rights Act is submitted for the record by the United States Catholic Conference, the national action arm of the Roman Catholic Bishops. The United States Catholic Conference strongly supports S. 1992, legislation to extend the Voting Rights Act.

Extension of the Voting Rights Act is a matter of basic social justice because the right to political participation for all people is one of the basic rights protecting human dignity. The right to vote is essential for full citizenship. Without it, we lose the power to take part in decisions which affect our lives. Without it, our full human dignity is impaired. The United States Bishops have repeatedly emphasized the importance of political responsibility. In their words, "We are all called to become informed, active and responsible participants in the political process." In a statement entitled, Political Responsibility for the 1980's, the Administrative Board of the Catholic Bishops expanded on this theme:

> "It is important for all Americans to realize the extent to which we are all interdependent members of a national community. Increasingly, our problems are social in nature, demanding solutions that are likewise social. To fashion these solutions in a just and humane way requires the active and creative participation of all. It requires a renewed faith in the ability of the human community to cooperate in governmental structures that work for the common good. It requires above all a willingness to attack the root causes of the powerlessness and alienation that threaten our democracy."

Papal teaching has likewise addressed this subject. In his encyclical statement entitled, Pacem in Terris, Pope John XXIII stressed that "all citizens should be provided, without any discrimination, the practical possibility of fully and actively taking part in the establishment of the foundations of the political community, in the direction of public affairs, and in the election of political leaders."

THE NEED FOR A STRONG VOTING RIGHTS ACT

The Voting Rights Act has done much to put an end to discrimination at the voting place. For millions of Americans it protects that most basic right to vote. In the past sixteen years the political process has been opened to millions of minority citizens who were previously excluded. There have been significant increases in minority voter registration, in minority voting and the election of minorities to public office. Despite much progress, the promise of equal participation is still unfulfilled. Witness after witness who testified during months of hearings held in the House Judiciary Subcommittee last year documented practices that still deny access to minority voters. The more obvious discriminatory practices such as poll taxes and literacy tests have been replaced by other barriers to full political participation by minority voters. These new, more sophisticated barriers take such forms as at-large election schemes, racial gerrymandering, and annexations. These practices are used to dilute the impact of the minority vote and to discourage political participation of minorities.

In Mississippi, people have to register twice to vote -- with the county clerk first, to vote in state and county elections, and with the city clerk to vote in city elections. Residents of northern Sunflower County, for example, must drive fifty miles to the county seat in Indianola to register for state and county elections and then drive fifty miles back to their home towns to register for city elections. Registration can take place only during regular business hours on weekdays. Increasingly, re-registration laws are also being employed to purge minority voters from the rolls.

The absentee ballot privilege is also abused. The Atlanta Constitution investigated the 1980 Taliaferro County, Georgia, primary and found that coercion of black voters was reinforced by highly questionable absentee voting procedures which dilute black voter strength. Absentee ballots accounted for one-third of the votes cast. The newspaper found that candidates, including incumbents who wield considerable local power, regularly hand-deliver absentee ballots to poor and illiterate black voters and stand by them while their ballots are filled out. Many former residents of Taliaferro County are allowed to vote by absentee ballot despite a state law prohibiting this practice. The sheriff's children, for example, including one who had not lived in the state for twenty years, voted by absentee ballot. Taliaferro County has a 70 percent black population, yet a black citizen has never been elected to public office.

At-large election schemes in which seats on a governing body are elected from throughout a city or county, rather than on a district-by-district basis, are often used to dilute the effectiveness of the minority vote. In Pike County, Georgia, a black came close to winning a seat on the county school board. Shortly thereafter, the county abolished the district system, forcing candidates to run countywide.

Discriminatory annexations of white suburbs or subdivisions are employed to decrease minority voters. For example, Chicanos were gaining strength in

Victoria, Texas. The city proposed an annexation change which under the preclearance requirement had to be submitted to the Department of Justice. The Justice Department objected to the annexation plan because it would have diluted the voting strength of Chicanos. Victoria now has Chicano representation on the city council.

Nationwide redistricting is occurring throughout the country as adjustments are made in conformity with the 1980 census. Reapportionment is discriminatory when lines are drawn for the purpose of minimizing minority voting strength. The Justice Department, responding to preclearance submissions, has already rejected a number of reapportionment plans which dilute the voting strength of blacks. In some places, reapportionment is being postponed in hopes that Congress will nullify or dilute the preclearance requirement.

In the words of a House Judiciary Committee member: "During the course of the hearings it has become progressively clear . . . that certain areas of this country have not aggressively sought to improve their electoral systems in a way that would permit minorities to become active participants." Without an extension of the Voting Rights Act, minority voters will not be protected against threats to their political equality. Moreover, the gains that have been made are likely to be undermined.

SENATE ACTION NEEDED

A strong, bipartisan bill was overwhelmingly passed by the House of Representatives and has been introduced in the Senate as S. 1992. It deserves the full support of the Senate. Several proposals to change the House-passed bill would seriously undermine the effectiveness of the Voting Rights Act.

1. The Intent Test

Opposition to the House bill in the Senate has focused almost exclusively on whether a violation of Section 2 of the Act requires proof of discriminatory purpose or intent. This Section prohibits practices or procedures which abridge or deny the right to vote on account of race. The House bill amends Section 2 of the Act to make clear that voting discrimination can be proved by evidence of discriminatory results without specific proof of intent to discriminate. This clarifying amendment has been necessitated by the Supreme Court's 1980 decision in Mobile v. Bolden, 446 U.S. 55. In Mobile a plurality of the Court held that Section 2 of the Act was intended to have an effect no different from that of the Fifteenth Amendment and that Amendment prohibits only purposeful discriminatory denial or abridgement by government of the freedom to vote on account of race, color, or previous condition of servitude. Establishing purposeful discrimination under Mobile presents a more difficult burden for plaintiffs to sustain than had previously been required in some lower court decisions. See Zimmer v. McKeithen, 485 F. 2d 1297 (5th Cir. 1973), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). Opponents argue that those who challenge discriminatory voting practices should be required to prove that there was a racially motivated intention to discriminate on the part of those who devised the system. This standard of proof is very difficult to meet, particularly when a challenged practice or procedure was established many years ago. In Edgefield, South Carolina, for example, a District Judge has found at-large elections to be clearly discriminatory. The Mobile decision forced him to change his ruling because, despite the blatant evidence, intent could not be proved.

The debate over the intent test cannot ignore that the Voting Rights Act was passed because historically previous efforts to secure the rights guaranteed by the Fifteenth Amendment had not been effective. It was agreed that the right to vote deserved special judicial protections. It was the "preserver of all other rights," and essential to a democracy.

Opponents argue that the results test is really a code word for racial quotas; that is, it will lead the courts to strike down election systems which do not mirror the racial and language minority groups' proportion of the population. This assertion is untrue. The amendment to Section 2 includes an explicit disclaimer to eliminate any doubt: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation." The results test is based on an aggregate of objective factors, not a single test.

The intent test should not be debated solely in technical terms or principles. The intent test really goes to the heart of the effectiveness of the Voting Rights Act in prohibiting certain kinds of practices which discriminate against minority voters. In this respect, the debate over the intent test is a debate over the most fundamental of all rights to participation in a democratic society and whether or not abuses will go unchallenged.

It is not sufficient for the Congress to acknowledge that the Voting Rights Act has been effective and to point to the achievements of minorities in voter registration and election. As the courts have held, the right to vote can be affected by a dilution of voting power as well as by a prohibition in casting the ballot. If the Section 2 amendment is not adopted, unjust systems may go unchallenged -- the Voting Rights Act will be effectively crippled. An intent test, which may be appropriate in other circumstances is not appropriate for the Voting Rights Act. It would weaken a law that has been extremely effective by making it harder to prove a violation. It would allow discrimination to continue.

2. Bailout

We do not support a more permissive bailout standard than the one established by S. 1992. The bailout provision in the bill would for the first time allow states and counties to escape the preclearance coverage established in Section 5 of the Act. Critics claim that the bailout standards are too stringent and are not a genuine incentive for covered jurisdictions to change discriminatory behavior. Studies of approximately 800 counties in major covered states demonstrate, to the contrary, that approximately one-fourth would be able to bail out by 1984 when the new provisions go into effect. Looser standards would effectively allow states or other political subdivisions to bail out without ending discriminatory behavior. Jurisdictions which continue structural barriers that discriminate should not be allowed to bail out. Neither should a bailout test ignore lawsuits, judgments, consent decrees and other legal actions stemming from voting abuses. Similarly, jurisdictions should not be permitted to bail out if their subunits are engaged in voting discrimination. Otherwise, a county, for example, would be able to bail out and escape preclearance while its cities and school districts pursue voring rights abuses. A more permissive bailout would weaken the preclearance requirement and the protections it affords minority voters.

3. Bilingual Elections

The Voting Rights Act has required bilingual registration and election materials in areas with large non-English speaking populations since 1975. These provisions should be continued for another ten years. Until that time, citizens who did not speak English had been barred from participation in the political process because elections were in English.

Most would agree that American citizens who are eligible to vote but who cannot understand English should not be penalized. Their problem, to a large extent, is a function of being denied equal educational opportunities. Since the introduction of bilingual election materials, Hispanic participation in the electoral process has increased dramatically.

Opponents have charged that bilingual election assistance is too costly. On the contrary, where bilingual elections are well implemented, the cost is minimal. In Los Angeles County, for example, 30 percent of the population is Hispanic. For the 1980 general election, 45,000 persons requested bilingual materials. The cost was only 1.2 percent of the total election.

Another charge leveled against bilingual elections is that they promote separatism. The very intention of bilingual elections is to reverse years of isolation and to integrate the long-disenfranchised Hispanic citizen into the political process. One of the best ways to avoid a separatist movement in this country is to encourage participation in the exercise of the right to vote.

CONCLUSION

Minorities of this country should expect nothing less than the full protection of their inalienable right to fair and equal participation in the political process. The extension of the Voting Rights Act is a matter of basic justice. This most basic right must continue to be protected through renewal of the Voting Rights Act. We urge adoption of S. 1992 without weakening amendments.

PREPARED STATEMENT OF ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK

I am grateful for the opportunity to submit this testimony to this distinguished subcommittee in support of the proposed extension of the Voting Rights Act of 1965 contained in S. 1992. I speak as the elected Attorney General of the State of New York -- a state which is not only covered by the Act's general provisions but which has three of its largest counties covered by the special provisions of the Voting Rights Act.

The right to vote and to have that vote count is the bedrock of our democracy. By ratifying the Fourteenth and Fifteenth Amendments in the 1860's, the states declared this to be true. By passing the Voting Rights Acts one hundred years later, Congress sought to make the Constitutions's promise of voter equality a reality, at long last, for our minority citizens.

Every state of course has the right to determine its own electoral processes, and the Voting Rights Act does not interfere with this right. But Congress has also declared that states' activities must be exercised within the constraints of the Fourteenth and Fifteenth Amendments. Federalism can mean no less.

The history of the past fifteen years has proven Congress right. The Voting Rights Act gives practical effect to the Fourteenth and Fifteenth Amendments. It has led to dramatically increased registration and voting among Black and Hispanic citizens, and has helped to increase the numbers of Black and Hispanic elected officials. Because the Act works so well, Congress wisely decided to extend its terms in 1970 and again in 1975.

The Act eliminated the literacy test for voting, a discriminatory requirement of long standing. And to assure that more novel or subtle devices did not replace older forms of discrimination, the Act included a "preclearance requirement." For the past fifteen years, this requirement has deterred the use of new forms of discriminatory practices --- in many cases by discouraging even their introduction into state legislatures.

In 1975, many argued that because the affected jurisdictions had made significant gains, the Act's preclearance requirement was no longer necessary. It turned out not to be true. In 1976, the Department of Justice objected to as many or more proposed changes from some affected states as it had in any previous year. Unfortunately, discriminatory practices will continue to be devised next year, and in future years, and our nation cannot tolerate that. The preclearance requirement is the crucial safeguard we must maintain. Therefore, I support the provisions of S. 1992 which make the preclearance provision a permanent part of the Act and simultaneously establish a workable "bail out" provision which would relieve affected jurisdictions of their preclearance obligations upon a showing that they have truly abandoned discriminatory voting practices.

Section 2 of the Voting Rights Act prohibits discrimination in voting; its terms are permanent and its coverage nationwide. Section 2, as amended by S. 1992, makes clear that this Nation will not tolerate voting practices and procedures which operate to deny minority citizens the fundamental right to vote. The amendment is of critical importance.

In 1975, Congress extended the protections of the Voting Rights Act to language minorities, after finding that they too had been systematically excluded from the electoral process. In the last six years, bilingual elections have begun to translate the Fourteenth Amendment into a reality for may American citizens who are not fluent in English. For example, the number of Hispanic citizens who voted last November was 20% higher than in 1976. And this increase took place despite what the Federal Election Commission in 1979 found to be "minimal" compliance with the bilingual provisions in some areas of the country. The bilingual provisions should be extended until 1992.

The bilingual and preclearance provisions of the Act apply only to states and political subdivisions that meet certain specifications. Kings, New York and Bronx counties in New York State are subject to these special provisions. New York's experience in complying with these requirements convinces me that the burdens created by these provisions are minimal. They are a burden only when ignored --- and that is precisely when we most need their strictures.

New York State has supported the Voting Rights Act from the outset. The Act has effectively secured the right to vote for many of our minority citizens. However, the battle is far from over. S. 1992, now before this committee, and passed overwhelmingly (as H.R. 3112), by the House of Representives, is an effective and necessary weapon in that battle. I urge the committee to support that bill.

SECTION 2: THE LEGAL STANDARD

Section 2 of the Voting Rights Act, as amended by S. 1992, prohibits the use of any discriminatory practice or procedure "which results in a denial or abridgement of" the right to vote on account of race or color or in violation of the protections afforded language minorities. This amendment clarifies the legal standard to be applied under Section 2, a clarification required by the decision in City of Mobile v. Bolden, 446 U.S. 55 (1980). There a plurality of the United States Supreme Court, abandoning prior case law, held that Section 2 requires direct proof that a voting practice was adopted or retained with the intent to discriminate. As Justice White noted in his dissenting opinion in Mobile, this new evidentiary requirement "leaves the courts below adrift on uncharted seas with respect to how to proceed." 446 U.S. at 103. The confusion engendered by the Mobile decision requires the amendment's clarifying language; however, it is our commitment to voting rights that requires the amendment's substantive language restoring the "results" standard.

Such a standard does not, as some argue, permit a finding of discrimination on no more than evidence of disproportionate election results, nor would it result in a requirement of proportional representation by race. These arguments are belied by the terms of the amendment which specifically provide:

> The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

The spectre of proportional representation is illusory. If the language of the amendment does not unequivocally make my point, the language of court decisions prior to the Mobile decision should do so. These decisions were made under the standard the amendment seeks to restore.

In these decisions, the Supreme Court, as well as lower federal courts, never imposed a requirement of proportional representation, nor did those courts find that the mere lack of minority officeholders was sufficient to prove discrimination. Indeed, such concepts were specifically rejected. For example, in White v. Register, the Supreme Court held:

> To sustain such claims it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question --- that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. 412 U.S. at 765 - 66.

The pre-Mobile cases focused on whether minorities had less opportunity than others to participate in the electoral process and not simply on the results of elections. In so doing, they considered the totality of circumstances surrounding the challenged procedures. Again, referring to White v. Register, the Supreme Court applied the "results" standard and struck down at-large voting procedures in two Texas counties, based on the trial court's "intensely local appraisal" of a wide range of facts showing that Mexican-Americans were "effectively removed from the political processes ...." 412 U.S. at 769.

By contrast, the intent test, as interpreted by the Mobile Court, requires courts to inquire into the elusive area of motive and often requires plaintiffs to prove the thoughts and intentions of long-dead officials. It is an impossible burden in almost any situation, and it is assuredly one that cannot appropriately be imposed in the critical area of voting rights. I say this with the full knowledge that I am advocating rejection of a standard which would virtually insulate from attack voting practices which as the Attorney General of the State of New York I may be called upon to defend. However, we are not here evaluating trial strategies, but rather the legal standards necessary to ensure equality of access to the right to vote. The amended Section 2 is vital to that effort.

THE PRECLEARANCE REQUIREMENT

Although the State of New York, like every state in this Nation, is subject to the prohibitions of Section 2 of the Act, only 22 States, including three New York counties, are subject to the preclearance requirement of Section 5 of the Act. The counties of Kings, New York and Bronx first came within the purview of the Act in March, 1971. It was then that the United States Attorney General determined that the literacy requirement imposed by New York law was a "test or device" within the meaning of the Voting Rights Act, and the Director of the Census Bureau determined that less than 50% of the persons of voting age residing in each of the three counties had voted in the preceding presidential election. Thereafter, as allowed by the Act, the three counties attempted to be exempted by the federal court from the preclearance requirement. They tried without success to demonstrate that New York's literacy test had neither the purpose nor effect of abridging any citizen's right to vote on account of race or color. As a result, New York has been required to submit to the Department of Justice all the voting laws and procedures enacted since November 1, 1968 which affect any of the three counties.

Because any change in state law or regulation necessarily affects the three counties, all such changes are precleared with the Department of Justice. Redistricting affecting any of the three counties is precleared; two examples are the upcoming statewide reapportionment and the recent realignment of the New York City Council after the 1980 Census. Additionally, changes unique to any of the three counties, such as location of polling places, are also precleared.

Because responsibility for complying with the Act's preclearance requirement regularly falls both on the New York City Board of Elections and the New York State Board of Elections, I had my staff discuss with the heads of these two agencies their views on the preclearance requirement.

The New York State Board submits to the Justice Department for preclearance all amendments to our election law. On average, eight to twelve amendments are submitted each year. The submission includes a cover letter of transmittal, a copy of the bill, the memorandum in support prepared by the bill's sponsor, any other memoranda that were influential in gaining passage, and the memorandum explaining the bill's terms and effect, which is prepared by the State Board of Elections for the Governor. By submission of these documents, the State Board of Elections is usually able to provide the Justice Department with all the information it requires to determine whether or not a proposed change will have a discriminatory impact. It should be noted that with the exception of a routine cover letter, the submission generally includes only documents which have already been prepared as part of the process by which the bill was enacted into law. On the rare occasion when this information is insufficient, the additional information required can generally be transmitted by telephone. When the voting change is not objectionable, the preclearance process imposes an insignificant burden on the state and results in no delay in implementing amendments to our voting laws.

The preclearance procedure followed by the City Board of Elections is similarly not cumbersome. The vast majority of changes submitted involve changes in local district lines and polling places. Again, the original submission is usually sufficient; when the Justice Department requires additional information, that information can also generally be provided by telephone.

Since becoming subject to the Act's preclearance requirement, New York has had more than 500 changes in voting practices reviewed by the Justice Department. The Department raised objections four times, twice in 1974, once in 1975, and once in 1981.

A brief mention of these situations aptly demonstrates the Voting Rights Act's effectiveness in preventing changes with harmful consequences for minority citizens. In September, 1974, the Department objected that certain polling places had been located in New York County in apartment complexes with mostly white tenants, although polling places had not been similarly located in complexes with mostly minority tenants. As a result of the objection, steps were taken to make polling places equally accessible to white and minority voters. In September, 1975, the Justice Department objected to the consolidation of two Democratic leadership districts in Manhattan. The proposed consolidation would have dismembered a predominantly minority district, with the possibility that the votes of minority voters would be diluted. As a result of the objection, the consolidation plan was abandoned. In each case, the objection was interposed in a timely manner, causing the minimum necessary disruption to the electoral process. And, in each case, the matter was resolved without litigation.

The third objection, and the one which resulted in the United States Supreme Court's decision in United Jewish Organizations of Williamsburgh, Inc. v. Carey, involved the 1974 redistricting of State Assembly, State Senate, and Congressional districts in Kings and New York counties. Most of the redistricting was unobjectionable. However, the Justice Department was concerned that the creation of certain districts in those two counties would have the effect of abridging the right to vote on account of race.

While, of course, New York had the right under the Voting Rights Act to challenge the Justice Department's determination in court, the state chose instead to redraw the districts to prevent vote dilution. The reapportionment amendments were submitted to the Justice Department on May 31, 1974 and were approved one month later. However, white voters in Kings County sued, alleging that the plan violated the Fourteenth and Fifteenth Amendments.

Ultimately, the Supreme Court in the UJO case upheld the plan, ruling that the Constitution does not prohibit racial considerations when they are used to minimize the consequences of racial discrimination. New York, in redrawing the districts, had appropriately sought to alleviate the consequences of racial inequities and to achieve a fair allocation of political power among white and minority voters in Kings County. Under the Voting Rights Act, the effectiveness of minority voting power could not be diluted by dividing minority communities among predominantly white districts.

The Court's decision in UJO acknowledges that a blind approach to redistricting may well produce grossly unfair results --- albeit perhaps unintended. For example, in Kings County, in the early 1970s, the bulk of the Black population was concentrated near the center of the county. At that time, the traditional method of drawing district lines in New York State was to start at the peripheries of a county and work towards the center. Using this method of redistricting, the Black population would likely have been divided among more districts than would have been the case if the redistricting procedures started at the interior of the county and worked outward. The 1974 district lines in Kings County were, accordingly, drawn to avoid any unintentional discriminatory effects that prior districting plans may have had in distributing Black residents, and thereby denying the residents a fair opportunity to elect representatives responsive to the needs of the minority community. Both on a local and national level, legislatures will reflect the interests of all of the people, and not just one segment of the population, only when election districts are drawn in a non-discriminatory manner.

The importance of the preclearance mechanism was graphically illustrated just last fall, when the Justice Department objected to the New York City Council's 1981 redistricting plan because the City had failed to show that the plan had neither the purpose nor the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.* Absent the preclearance requirement, a discriminatory redistricting plan would have been implemented, and years spent thereafter in expensive and time-consuming litigation, while the voting strength of New York City's Black and Hispanic population was unfairly diluted.

The 1980 and 1990 post-census redistricting create the possibility of unfairly diluting the voting strength of the growing numbers of minority voters. This seems to me argument enough for extension of Section 5's preclearance requirement. Additional argument, however, is found in Section 5's deterrent effect. Some point to the fact that of the hundreds of submissions from New York, only four have resulted in objections. They cite this as evidence that Section 5 has become an unnecessary burden. I believe rather that these figures are evidence of the Act's effectiveness as a deterrent. A former member of the New York Senate's Election Committee has described to us how amendments to the Election Law, which might have had a discriminatory effect if passed, were often defeated or not even offered because of the barrier erected by the Voting Rights Act and the need for preclearance by the Justice Department.

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* Specifically, the Justice Department found:

> that the proposed plan will lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise and that the plan does not fairly reflect minority voting strength as it currently exists...the retrogression found to exist in each covered county results primarily from the City's departure from its own nonracial plan-drawing criteria. Since no nonracial justification has been offered for these departures, and in light of the obvious effect, we are also unable to conclude that the city has satisfied its burden of demonstrating that the plan was drawn without a racially discriminatory purpose ....

Letter of October 27, 1981 from Assistant Attorney General William Bradford Reynolds to Fabian Palomino, counsel New York City Council Redistricting Committee.

The burden of meeting the preclearance requirement is one we can well afford. It is far less costly and far more expeditious to process five hundred voting changes through the Justice Department than to litigate through the courts the manifold challenges that would ensue absent preclearance. And, more importantly, Section 5 is a crucial safeguard of the gains the nation has made in transforming the promises of the Fourteenth and Fifteenth Amendments into reality. It should be made a permanent provision of the Act.

BAILOUT

S. 1992 make the preclearance requirements of the Voting Rights Act permanent, and simultaneously eases the criteria for an affected jurisdiction to "bail out" of those requirements. In order to bail out, an affected jurisdiction must demonstrate that for ten years it has fully complied with the Voting Rights Act and that it has taken affirmative steps to ensure the elimination of discriminatory voting procedures and the participation of minority citizens in all phases of the electoral process. This approach is a fair one.

PROTECTING THE RIGHTS OF LANGUAGE MINORITIES

The language minority provisions of the Voting Rights Act are equally important in guaranteeing the right to an effective vote. New York State has a Hispanic population of at least 1.6 million people, 1.4 of whom live in New York City. As much as I would like to be able to say that New York has a long history of protecting the voting rights of its language minority citizens, I cannot fairly say that. However, I can state that --- with a prod from Congress and the federal courts --- we are taking steps to bring our Hispanic citizens into the the electoral process.

In 1965, the Voting Rights Act included a provision, Section 4(e), which mandated that no person who has successfully completed the sixth grade in a public school,* or a private school accredited by the Commonwealth of Puerto Rico in which English was not the language of instruction, could be denied the right to vote in any election because of an inability to read or write English. This provision was sponsored by Senators Robert Kennedy and Javits and Representatives Gilbert and Ryan, all of New York. Its explicit purpose was to deal with the disenfranchisement of large segments of the Puerto Rican population in New York because of an English-language literacy requirement in New York's constitution and election laws. There were those who honestly believed that New York's English-language literacy requirement for voting was an appropriate mechanism to encourage our citizens who did not speak English to learn it. But Congress declared that so precious a right as the right to vote cannot be withheld while a citizen, otherwise qualified to vote, is learning English.

As an example, all those born in Puerto Rico are citizens of the United States. While Puerto Rico has a bilingual society, the primary language of Puerto Rico's people and its classrooms is Spanish; many citizens, born and educated in Puerto Rico, are unable to speak, understand or read English. Until the mid-1970's, New York had no comprehensive program of instruction in English and Spanish. Congress recognized that it was inappropriate to penalize citizens for attending Spanish-language schools in Puerto Rico, or schools in the United States which had only recently begun to implement effective educational programs to teach English.

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* In 1970 Congress eliminated the sixth grade education requirement.

Elimination of the English literacy test was only the first step in opening the New York electoral process to citizens who are not fluent in English. In 1974, in Torres v. Sachs, a federal court, finding that New York's English-only voting procedures violated the Voting Rights Act, ordered New York City to provide bilingual elections. In 1975, the State Board, after encountering some difficulties in obtaining statewide implementation, consented to a similar federal court order requiring bilingual elections statewide in Ortiz v. New York State Board of Elections.

The New York experience demonstrates the importance of the bilingual provisions and the fact that they are not burdensome or costly to implement. In New York City, all printed election materials are bilingual. To the extent possible, all forms are printed in both Spanish and English on the same form --- either front and back, top and botton, or left and right side.

The financial burden to the state of bilingual elections is minimal; beyond start-up costs, the sums are truly insignificant. For example, all translation of state-wide registration and voting materials is handled by the New York State Board of Elections. The translations are done by the Chairman of the Political Science Department of the State University at Albany, and cost, on average, just over $1,000 per year for the entire state. In Westchester County, with a Hispanic population of over 45,000 people, the costs of providing bilingual materials is approximately $3,000 per year, or less than .2% of the County Board of Elections' budget. By using volunteer interpreters provided by the Maryknoll priests and local Hispanic organizations, Westchester County spends no money on interpreters. And the return on these insignificant expenditures is enormous. It is estimated that since New York first provided bilingual elections, Hispanic registration has increased by 20 percent. Since 1965, the number of New York Hispanic representatives in the state and federal legislatures has more than doubled. With minimal costs or burden, New York has done much to integrate the Hispanic community in New York into the electoral process.

To those who contend that the bilingual provisions of the Act are no longer necessary, I point to the fact that significant numbers of people still emigrate to the United States from Puerto Rico alone. All of them, and many other Hispanic citizens who are not fluent in English, are citizens, entitled to vote. The Fourteenth Amendment's guarantee of voter equality demands continuation of the Congress' commitment to the Act's bilingual provisions.

CONCLUSION

The special provisions of the Voting Rights Act apply to all or part of 22 states. As I have testified, three New York counties, with more than 4.8 million people, are covered by the Act's special provisions. More people are protected in these three counties than are protected in the States of Alabama (3.9 million), Mississippi (2.5 million) or South Carolina (3.1 million) and only slightly less than in Georgia (5.4 million) or Virginia (5.3 million).

I am troubled by the argument that the Act singles out the Southern states. Even the few statistics I have cited indicate otherwise. Furthermore, the Act's special provisions are triggered only by practices that are demonstrated to have a discriminatory impact, regardless of the state where they occur. And the "bail out" provisions of S. 1992 set forth a sensible procedure by which covered jurisdictions that have demonstrated a true commitment to voter equality may be relieved of their preclearance obligations.

I am equally troubled by the argument that Section 2, as amended by S. 1992, would require racial quotas or proportional representation or perhaps even the invalidation of past elections. The language of the amendment, the testimony of scores of experts, and court decisions prior to 1980 clearly demonstrate otherwise. We must reject the scare tactics of those who seek to prevent the adoption of the "results" approach of S. 1992.

In sum, S. 1992 ensures that minority voters will have equal access to the fundamental right to vote. It is a fair and just bill. I urge its adoption.

PREPARED STATEMENT OF REV. DR. ARTHUR L. MACKEY

I currently serve as Chairman of the Board of Trustees - Eastern Baptist Association of New York, Inc., Rev. Dr. Robert A. Laws, Moderator. In addition, I serve as First Vice President of the Nassau Council of Black Clergy, Inc., Rev. Enoch W. Terry, President. I am also the Pastor of Mt. Sinai Baptist Church of Roosevelt, New York.

The Eastern Baptist Association consists of 289 Black Baptist Churches in the Counties of Kings, Queens, Nassau, and Suffolk, in the State of New York, representing a church membership of approximately one (1) million congregants.

The Nassau Council of Black Clergy is an interdenominational fellowship of Black Clergymen representing more than sixty (60) churches of approximately 50,000 members.

According to the Voting Rights Report published by the Joint Center for Political Studies, on December 16, 1981, Senators Charles McC. Mathias (R-MD) and Edward M. Kennedy (D-MA) introduced S. 1992, a bill to extend the Voting Rights Act of 1965. Sixty-one (61) senators co-sponsored the bill, identical to H.R. 3112, which passed the House on October 5 by a vote of 389-24.

Twenty-one (21) Republicans--including eight (8) committee chairmen--joined forty (40) Democrats in co-sponsoring the legislation. A good number of Southern Democrats were included. Senator Russell Long (D-LA) told National Public Radio correspondent Nina Totenberg, "I think it's good legislation. If the law has the effect of denying people their right to vote, it should be stricken down and people should be protected. I think the way the House bill passed is correct, and I support that position."

Senator Mathias told a packed press conference on December 16 that "this legislation has the enthusiastic support of the majority of the Senate. We have the determination to carry the effort through . . . to provide an electoral process of which discrimination has no part."

Noting that some members would actually "prefer stronger guarantees," Senator Kennedy told the press conference that he felt sure "this legislation will satisfy the goal of full voting rights for all American people."

Kennedy also pointed out that the list of co-sponsors is double the number of co-sponsors of an extension bill introduced earlier. "This indicates that people across this country feel that the Voting Rights Act is a fundamental, national legislative commitment."

S. 1992, like its House-passed counterpart, H.R. 3112, provides for:

1. Continuation of the preclearance provision of the Act while providing reasonable incentives for states and counties to "bail out" from the preclearance requirement.

2. Continuation until August 6, 1992 of the requirement for billingual election materials and voting assistance.

3. Strengthening of the criteria for voter discrimination charges under Section 2 to allow the examination of the result of each violation, not just the intent.

As Black religious leaders, who have our fingers on the pulse of more than a million Black congregants, we know, and they have told us, that they look to the extension of this bill for continued hope in the democratic system. Failure to pass this bill signals to us and our members, a continual dismantelment of those guarantees obtained during the civil rights struggle of the '60's and '70's.

Gentlemen, given the very tense and uncertain period in our nation's history and development, with concomitant massive budget cuts in social programs and retrogressive shifts in civil rights enforcement policies and regulations, when considered in total, represent a dramatic reversal in the nation's commitment to social equity, and thereby threaten our nation with grave economic, social and political consequences.

Therefore, the Eastern Baptist Association of New York, Inc. and the Nassau Council of Black Clergy, Inc., join the Leadership Conference on Civil Rights and other religious, civic and professional organizations across the United States in full support of S. 1992, without amendment. We further urge the Chairman and each member of the Senate Judiciary Subcommittee on the Constitution to adopt S. 1992, without amendment; to influence their Senatorial colleagues in passing S. 1992, and to urge the President of the United States to sign S. 1992, without amendment, into law.

Therefore, gentlemen, we are praying GOD's richest blessings upon you, the President, and our Country.

PREPARED STATEMENT OF RABBI DAVID SAPERSTEIN

Mr. Chairman. My name is Rabbi David Saperstein. I would like to thank you for this opportunity to share with this committee the concerns of the Union of American Hebrew Congregations and the Central Conference of American Rabbis on the Voting Rights Act Amendments of 1981. The two agencies which I represent together comprise the Reform Jewish movement, consisting of over one million Reform Jews and over 1000 Reform rabbis throughout the United States. We have long been deeply involved with the struggle for equal rights for all citizens. "We are humbled by the knowledge that if democracy cannot end discrimination, discrimination may end democracy. We pledge ourselves, as individual Americans and as inheritors of the dream of one brotherhood under God, to be as zealous for the dignity and rights of our neighbors as we would have them be of ours." (UAHC Biennial Convention, 1963). In support of this position we have long supported the Voting Rights Act.

Judaism and the Jewish people have been bound up with an age old commitment to equal rights and equal opportunities for all people. Our religion first gave to the world the idea of the parenthood of God and the brotherhood and sisterhood of all humankind. Our ancestors taught the world that every person is a child of God. Jews taught in the Midrash, interpretations of the Biblical stories, that when God created humankind God did so by creating a single person, a person created from the clay of all colors and all parts of the earth so that no person could ever say that "my people are better than yours." Democracy is based on the Jewish idea that every human being must be treated as the child of God and given equal dignity and equal opportunities no matter one's color, race or sex. The belief in freedom of choice, the idea that we are responsible for our own fates and for the fate of our society was a fundamental contribution of Judaism to Western civilization. This belief in the inherent freedom of choice of all people is the root of the democratic commitment to voting rights for all people.

In a few weeks, the Jewish people will celebrate the holiday of Passover which reminds us that we were once slaves in Egypt and which commands us that we must remember that experience and must "understand the heart of the stranger." Tragically, the badge of slavery has not yet been eliminated for those who were once systematically victimized by this nation. In many ways there are minority communities in this country which are still regarded as "the stranger" because of racial or ethnic features, who would be deprived of fundamental rights by local communities if the nation as a whole did not guarantee equality of rights for all its citizens.

The Voting Rights Act of 1965 was established specifically to protect the sacred right to vote of a large segment of the American population - the black community. The Union of American Hebrew Congregations and the Central Conference of American Rabbis support the extension of the Voting Rights Act for another ten years; support the retention of the preclearance procedures under section 5, procedures targeted to meet the problems raised in areas of the country which once had discriminatory literacy test; support the retention of the 1975 provision for bilingual election provisions throughout the new ten year extension; and support a change in section 2 to return the standard of proof under section 2 in order to restore the standard of proof which governed discriminatory vote dilution cases before Mobile v. Bolden.

The Congress must ask itself two threshold questions. The first is whether the struggle for voting rights has been won. Over the fifteen years of the Act, the Justice Department, under the preclearance provisions of Section 5, has prohibited some 800 changes recommended by local communities or states - changes which would have maintained discriminatory voting mechanisms and procedures. These changes included gerrymandering in the form of redistricting, annexations, at-large voting mechanisms, multi-member districts and similar attempts to dilute the concentration of black votes. More than half of these 800 objections were entered in the five years since the last extension of the Act in 1975. Furthermore, we must presume that there are numerous jurisdictions which are deterred from attempting to implement restrictive provisions because of the watchful eye of the federal government.

The second question which the Congress must ask is whether the Voting Rights Act provides the most effective and the fairest means of achieving the goal of voting rights for all Americans. I believe that it does - this Act has functioned with remarkable efficiency and fairness. If Section 2 is amended as suggested, the Act will continue to function as a fundamental guarantee of the right of any voter to sue in federal court if his or her right to vote is abridged or denied on account of race. The preclearance procedures provide a simple, fast, fair and effective means of preventing those areas of the country which have had a history of discrimination in voting rights from backsliding from the major advances this Act has achieved.

There are three major concerns raised by this legislation on which we wish to comment. The first is the necessity of maintaining the preclearance procedures _as they currently exist_ under Section 5. The procedure of the preclearance provisions is efficient and speedy. The clearly stated rules create consistent standards for the Justice Department to follow. The availability of the court provides an alternative route to test any decision considered unfair provides a check on the actions of the Justice Department.

There is a proposal which has been brought forward to make the provisions of the preclearance mechanism applicable "nation-wide." We oppose that proposal. The current budgetary situation makes this proposal a clearcut attempt to dilute the impact of the Act and to undercut the effectiveness of the Justice Department's work. It bears repetition that the Voting Rights Act _is_ applicable nationwide. Some of its provisions are applicable to each American citizen. Other provisions are aimed at those juridictions - _anywhere_ in the country - which have engaged in systematic and systemic deprivation of the right to vote.

The constitutionality of this mechanism was recognized by the

Supreme Court in South Carolina v. Katzenbach. It is legal and it is effective. And I know that I need not remind this committee that a federal court may impose the preclearance requirement on any other jurisdiction where there has been a finding of such discrimination.

The second concern on which we wish to express our opinion is our commitment to the notion that the right to vote must not be restricted on the basis of language. There are millions of Americans who without bilingual provisions would be deprived of that right to vote. They are effectively excluded from the electoral process simply because they cannot understand what the ballot says and what the voting instructions are. This is particularly unfair since the burden of language limitation often falls on those segments of the society which already are deprived of adequate access to the economic, political and social mainstream of American life. They must not now be deprived of their most powerful tool to redress their grievances - the vote. It is our position that these provisions should be extended so that they run concurrently with the rest of the Act.

Finally, we support a position that seeks to change the standard for proving discrimination from that imposed by the Supreme Court in Mobile v. Bolden to the standard which existed prior to that case. In 1973, in White v. Regester, the Supreme Court upheld the position that numerous factors, including direct and indirect evidence, could be introduced to establish the existence of voting discrimination. In Bolden, the Court maintained that only direct evidence of specific intent to discriminate is adequate. This is a difficult standard requiring that plaintiffs prove a subjective state of mind. Such a standard not only contradicts the intent of the legislation but undermines the ability of the Justice Department to enforce it.

This issue is sometimes confusingly referred to as a conflict between an intent standard of evidence and a result standard of evidence. There is no constitutional right that guarantees a particular result, e.g. that the member of a particular group must be elected. But there is a constitutional right to change an electoral system which makes it impossible for a member of that group to be elected. And often "results" provide an objective standard which can be used to indicate the existence of a discriminatory system.

We are aware of the concern expressed by some witnesses that S. 1992 would require proportional representation on the elective bodies of the Nation's state and local governments. Much of the testimony in opposition to S. 1992 boils down to statements by those witnesses that it would be unwise and undesireable to enact legislation which would take us down the path of a balkanized electorate with a quota of elected officials from each group. We agree with that reservation. So have all of the Senators on this Committee who are sponsors of S. 1992. But like them, we simply do not believe that concern is any basis for opposition to S. 1992. S. 1992, as drafted and as continuously explained in the legislative history, clearly eschews any such notion of proportional representation, either as a basis for declaring an election system invalid, or as a standard for fashioning judicial relief once a violation of Section 2 is found. Why is this so? First, as has been repeatedly pointed out by the sponsors of S. 1992, it contains an express disclaimer of any such requirement. Second, the House Report, the statements of the Senate sponsors and, we are confident, the Senate Report, all will have made clear that the legislative intent of the amendment to Section 2 is to adopt the standard set down by the Supreme Court in the White v. Regester case and applied by the Courts of Appeals in some two dozen cases before the Mobile case.

The Court in White expressly said that plaintiffs had to show more than that there was an absence of proportional representation. Plaintiff under the White test, plaintiffs have to show that they have been shut out of a fair opportunity even to participate meaningfully in the electoral process.

In a substantial number of the cases brought under White, plaintiffs did show that at large elections had resulted in a lack of proportional representation -- indeed, in some cases virtually no representation for minorities at all. Plaintiffs in those cases also established some of the other factors which the White decision had said were relevant to establishing a violation. And yet in many of these cases, the plaintiffs lost. The courts ruled that they had not established a denial of fair access the process.

In short, there is a clear track record under the standard which this bill would enact and it refutes the fears that have been raised.

The claims by the Attorney General and Assistant Attorney General Reynolds that S. 1992 will produce proportional representation and the death knell for at-large elections are ill-considered and unwarranted misstatements of what the law has been and of what S. 1992 would enact. Their testimony has been effectively rebutted in our view by the testimony of Archibald Cox, one of the nation's most distinguished legal scholars, by Mr. David Brink, the president of the American Bar Association, and by the other expert witnesses who testified on the basis of their extensive experience in litigating the cases decided under the White v. Regester standard. We are troubled that the highest officials of the government agency charged with protecting and enhancing civil rights should be so persistently determined to raise unjustified arguments against the enactment of a strong and effective extension of the most important civil rights law of our time. Far beyond the technical dispute over detailed legal analysis and past decisions, there lies an overarching moral question. It appears to be undisputed that the law in this area needs to be clarified in light of the confusion caused by the Mobile decision. In the final analysis, we believe Congress faces a simple choice. The law can be clarified in a way which provides a realistic and fair opportunity to remove remaining vestiges of racial discrimination in our nation's elections. Or it can be clarified in a way which will insulate those shameful vestiges from effective challenge. We strongly urge the Congress to choose the path of fairness and equal justice by enacting the House-passed amendment of Section 2.

Our democratic process is based on the belief that each of this nation's citizens has the right and the responsibility to vote. Our system of government is enriched by the full particicipation of all of its citizens in the electoral process. We undermine the strength of this nation and make a mockery of our pretensions for fairness and democracy when we undercut the strength of legislation which has successfully and fairly reduced voting discrimination in our country. Such legislation will not be needed indefinitely, but we urge the Congress to extend for ten years this legislation to help guide the country through the redistricting which follows the census completed last year and the next census in 1990.

PREPARED STATEMENT OF THE OFFICE FOR CHURCH IN SOCIETY UNITED CHURCH OF CHRIST

This statement is prepared on behalf of the Office for Church in Society, United Church of Christ located at 105 Madison Avenue, 11th floor, New York, New York, 10016. The United Church of Christ is a 1.7 million member Protestant denomination which was formed in 1957 as a result of the merger of the Congregational-Christian Churches and the Evangelical and Reformed Church. The Office for Church in Society is a National Instrumentality of the United Church of Christ which has had a longstanding record for support of such causes as fair labor practices, industrial and mine safety, civil rights, rights of women, criminal justice reform, foreign aid, free trade, and world peace.

This is submitted in wholehearted support for the extension of the Voting Rights Act. It is a reflection on racism--both personal and institutional in this society affecting religious as well as political institutions. The arguments presented here are moral arguments in an attempt to persuade a society and a government if it is truly committed to overcoming the inequities and injustices in the national life.

The United Church of Christ has a concept of religion that inclues an emphasis on social and racial justice. Many of the policy statements from General Synod and other bodies of the United Church of Christ speak to racial justice in the political process.

In 1963 the General Synod of the United Church of Christ issued "A Call for Racial Justice Now" which stated that "...the Church must become radically committed at particular times and places to the struggle of our fellowmen...", including the struggle for the right"...to register, vote, and run for office without fear of retaliation, either overt or subtle."

The Council for Christian Social Action issued a statement in April 1966 on the extension and protection of civil rights. This council, as has other parts of the UCC structure, established a strong record in support of the struggle for racial justice, noting the persistence of discrimination in national life and inadequate enforcement by the federal bureaucracy. It was noted that the Department of Justice in particular failed to follow through on the enforcement of existing civil rights statutes because of a reluctance to increase federal power at the expense of traditional state responsibility.

The denomination has continued to emphasize and speak out on racial justice issues in succeeding years. The Eighth General Synod meeting in June of 1971 stated as a priority, Liberation, Justice and Empowerment for the Racially Oppressed. To achieve the goal of political rights it was necessary "to urge all members of the United Church of Christ to support efforts of minority groups to organize and to press for equal social and economic opportunities for all persons." It was urged that the church "support in as many ways as possible voter education and registration taskforces in rural and urban areas to assist in the registration of individuals from racial minorities and the poor." It was also urged that the Department of Justice implement the existing Voting Rights Act by expanding the use of federal registrars.

Support for the Voting Rights Act was issued at the time of extension in 1970 and again in 1981 at the Thirteenth General Synod of the United Church of Christ meeting in June. The resolution which was voted for overwhelmingly by the 705 delegates representing nearly every geographical area in this country reads as follows:

VOTING RIGHTS ACT

Support for the Voting Rights Act
Amendments of 1981

WHEREAS, the sin of racism and brokenness in the civil order it causes in the body politic remain, we are moved once again to lift up our voice in confession and repentance as citizens of the United States and as faithful people of God;

WHEREAS, The General Synod of the United Church of Christ in 1963 affirmed the right of all Americans "to register, vote and run for office without fear of retaliation either overt or subtle";

WHEREAS, The General Synod in 1963 called for extending the program of voter registration;

WHEREAS, a Resolution on Civil Rights Legislation by the UCC Executive Council on October 22, 1962 called on Congress to enact strong civil rights legislation and to include provisions for the "protection of the voting rights of all citizens in all types of elections";

WHEREAS, Congress passed a Voting Rights Act of 1965 and six states of the South and 41 counties in various other parts of the country came under the coverage of the Act;

WHEREAS, the Voting Rights Act is considered one of the most effective civil rights bills ever passed, resulting in significant improvement in voter registration and numbers of Black elected officials;

WHEREAS, before 1965, the registration rates for Blacks were very low especially as compared to white registration rates, ranging from 7% (in Mississippi) to 37% (in South Carolina); by 1976 Bureau of the Census data showed substantial increases with Black registration rates at least 47% and in several states above 60% of eligible Black voters registered;

WHEREAS, prior to 1965, the number of minority elected officials in the six states was less than 100; in 1968, 156 Blacks had been elected; in 1974, 963 Blacks held public office in these states; and by July 1980, the number had increased to 2,042;

WHEREAS, Black registration rates as well as rates for Hispanics, American Indians and Alaskan Natives continue to be lower than white registration rates in the same localities, and recognizing that minorities must continue to struggle to retain one of the most fundamental rights guaranteed by the US Constitution, the right to vote, because of persistent resort to barriers which would deny full political participation by minorities;

WHEREAS, these barriers have changed from literacy tests and poll taxes to other forms of voter discrimination such as redistricting or gerrymandering, discriminatory annexations, at-large elections and other voter "dillution" practices;

WHEREAS, the Voting Rights Act amended in 1975 is due to expire August 6, 1982;

BE IT RESOLVED that the Thirteenth General Synod of the United Church of Christ calls on Congress to extend the Voting Rights Act Amendments of 1981 as a protection to the voting gains of Blacks and Hispanics and to protect minorities in the political arena against the continued use of devices which would discourage minority political participation; and

BE IT RESOLVED that the vital preclearance provisions of Section 5 which requires certain states and local governments or covered jurisdictions to submit proposed changes in voting or election procedures to the US Department of Justice be kept intact; and

BE IT RESOLVED that the minority language provisions and voting assistance in languages other than English be continued to protect Mexican-American and other language minority groups against severe discriminatory practices particularly in the southwest and western parts of our country; and

FURTHER, BE IT RESOLVED that the United Church of Christ, its members, Instrumentalities and other bodies be united in a commitment to the Voting Rights Act and communicate to members of Congress that the legislation be extended long enough to cover redistricting up until the next decennial census in 1990.

The Office for Church in Society carrying out the responsibility entrusted to it by the General Synod has taken an active role in efforts to extend the Voting Rights Act. The Office communicated to the House Judiciary Committee and all members of the House of Representatives. The Office joined with other religious groups that share a concern for social and racial justice in an interreligious communicative effort to members of Congress on the broad support for the extension of the Voting Rights. And the Office works with a broad range of groups representing major institutions of this country such as labor, educational and other associations for the passage of an effective Voting Rights Act.

The Office for Church in Society has been represented in various places across the country these last several weeks--in Norfolk, Virginia; El paso and San Antonio, Texas; at forums to discuss racial justice and the Voting Rights Act. In Norfolk, the Black community was very much concerned with the redistricting process and held a public event at a local United Church of Christ Church on the Virginia redistricting plans, to talk about the plan's implications for political representation and political power. In El Paso, interaction took place with the Mexican-American community which sought ways to overcome a sense of powerlessness and non-responsiveness to its unique problems from the political structures in the region.

In San Antonio there was an interaction with both the Black and Mexican-American communities, concerned with problems of racism and its effects in such areas as unemployment and housing.

These communities acknowledge that the Voting Rights Act has been extremely important and has brought a renewed interest in the political process. But in spite of the tangible benefits, there is also recognition that the Voting Rights has not been entirely successful in overcoming some of the injustices in the political process because the political process effects so many other aspects of the community life, such as in education, the delivery of social services, etc.

The Voting Rights Act is important to language and racial minorities because of its impact on systemic discrimination in the political process. It is because of this that the Voting Rights Act is considered one of the most effective pieces of civil rights legislation ever passed. The Voting Rights Act must be extended to preserve the gains already made and to be effective against some of the deeply rooted discriminatory tendencies in the political process.

The need for the Voting Rights Act extension is based on observations of inherent, persistent tendencies in this country's political fabric preventing the progression to a more just society. In 1971 when racial justice was listed as a priority by the General Synod, vigorous enforcement of federal civil rights statutes was called for. It was noted that vigorous enforcement had been tempered because of concern over states prerogatives. That is, states rights had been justified to inhibit the federal government from moving to protect the rights of citizens. When effective civil rights statutes were placed on the books, the states' rights argument continued to be used to prevent vigorous enforcement to protect the constitutional rights of citizens.

Today, there is an attempt to deny the striving for justice and to change the role of the government and its commitment in the struggle for justice. There is an attempt to have government shirk its responsibilities thus decreasing the role of the government and turning back the clock of progress.

The fact that the Voting Rights Act is needed and serious opposition has developed against the extension has to be examined in the context of the moral climate of this country and the influence that climate is exerting on the political process. The moral climate at least to many, appears to make it acceptable that the government has to lessen many of its obligations towards its citizens. The government is abandoning some of the very functions for which it was meant to serve--the protection of civil rights of all its citizens.

There is a particular purpose the government has- a special function it should serve towards its citizens. The government should not be a captive of special interests or a particular group. Political power should not be exercised to keep out citizens because they are powerless and because of their color. The state should not deny the rights of any citizens or ignore them. Any institution that claims its rights has a special duty to carry out its responsibilities. States' rights should carry with it state responsibility as with any exercise of governmental or institutional power.

A reflection on the need for the extension of the Voting Rights Act is a reflection on the political climate of this country. There is a moral obligation that this country has to protect the political rights of all its citizens, but there is question because of the political climate, as to the real commitment of this government towards racial justice. Major rollbacks in civil rights policies are being effected under the guise of new arguments.

The resistance to fulfilling the moral obligations to achieve racial justice in this society is based on the presence of racism. Racism has two interrelated forms. There is the individual expression of racism or personal racism. Then there is institutional racism or systemic racism reflected in the political, economic, and social institutions. Institutional racism is defined as established social patterns that support explicitly or implicity a racist value system. (This definition is taken from the remarks of Dr. Woodie W. White, General Secretary of the General Commission on Religion and Race, The United Methodist Church on February 10, 1982 in San Antonio, Texas.)

Institutional racism manifests itself economically in the disparity between the employment ratio of blacks vs. whites and in the income differentials between whites and non-whites in this society. Institutional racism in the social institutions is reflected in the geographical patterns of residential segregation by the minority community. And the institutional racism in the political setting is apparent in the lack of political representation in county commissions, city councils, school boards and other governing bodies by the minority community.

Personal racism is enhanced by institutional racism. Indeed, institutional racism contributes to personal racism. Personal behavior and attitudinal racism still flourish. Denials of personal racism and statements of personal abhorrence of racism have been made in recent weeks by the President and the Attorney General. But larger than the declarations of public officials is institutional racism, that is the racism in the political, economic and social institutions of this country. Rather than explore the levels of personal racism, and simply decalre that they are without personal prejudice, public officials have the duty to perfect institutions, to eradicate institutional racism.

Institutions should treat people equally and justly irrespective of their color, and institutional benefits should not be denied because of a person's membership in a racial or language minority group. Unfortunately, our institutions do not do this. Thus the rootedness of systemic racism and the promulgation of civil rights laws designed to alleviate racism in political institutions.

Institutional racism, unlike personal racism, can be examined and is what is of greatest concern in the political process. Racism should be measured by the results that these institutions produce. There is continued resistance by government, industry and even the churches to the principle that the presense of or elimination of racism can only be measured by results.

If the elimination of racism were based on intent, a victory could be declared as the intent to discriminate has gone underground or taken a more subtle form. It is difficult to escape the conclusion that nearly twenty years of attempts to restrict this nation's institutions in their ability to exercise systemic racism or superficial levels of operation has not produced racial equality, but a far more sophisticated and a more deeply embedded system of white racism. And, it is when one measures racism by the results that this becomes undeniably clear.

In a moral sense, laws should not have the appearance of justice but should in fact be just. Civil rights laws or policies have to go beyond the declaration of what is or is not the law. Enforcement mechanisms have to be strong and effective. And the standard of proof should be stringent enough to find if violations have occurred. Discriminatory results or effects are an effective test to determine if violation or discrimination exist or has occurred.

Finally, the Voting Rights has been an effective tool to deal with the systemic racism in the political process. The extension is a recognition of the gains already made in assuring access to the political process by racial and language minority groups and in recognition that vigilance to assure equal access must continue. The Voting Rights Act must not fall victim to forces calling for reducing the federal commitment to civil rights enforcement, or the reassertion of states' rights.

The Office for Church in Society, United Church of Christ believes that support for the extension of the Voting Rights Act is a litmus test to genuine commitment to racial justice and supports fully legislation S.1992.

PREPARED STATEMENT OF HON. PETER W. RODINO, JR. IN SUPPORT OF S. 1992

I appreciate this opportunity to urge you, Mr. Chairman, to join in support of S. 1992, the voting rights legislation that has been endorsed by 64 of your colleagues.

I have heard it suggested that some of those endorsements were won because this legislation was misrepresented to them as merely an extension of the current law. That is not so. On the very day I introduced this legislation in the House last April 7, I stated that the bill "would amend section 2 of the Act so that plaintiffs in voting rights suits would have to prove that actions by state and local governments had resulted in voting discrimination. This change is necessary to restore the law to where it was--and to what Congress intended--before a Supreme Court ruling last year."

I also discussed this change to make the language of section 2 comport with that of section 5 during the thorough floor debate of this matter last fall. All House members were fully aware of this provision when they passed H.R. 3112 by a vote of 389 to 24 last October 5.

In addition, the senators who introduced S. 1992 discussed this section 2 change. This legislation was never misrepresented.

On April 22, 1980, the U.S. Supreme Court held in City of Mobile v. Bolden that, absent a finding of intentional or purposeful discrimination, a challenged practice or procedure does not violate the 14th or 15th Amendments or section 2 of the Voting Rights Act.

Following that decision civil rights groups, attorneys and social scientists convened a series of meetings and seminars over a period of months to discuss the implications of Mobile. They were disturbed not only by the holding of Mobile but also by the analysis used in the plurality opinion. The concern was--and is--twofold: first, the plurality's holding that section 2 of the Voting Rights Act does no more than restate the 15th Amendment, which requires proof of intentional discrimination, and second, the plurality's dismissal of the standard for review set forth in White v. Regester and further elucidated in Zimmer v. McKeithen, which has guided the lower courts until Mobile.

I would like to address each of those concerns separately and then discuss the purpose for the section 2 amendment which was passed overwhelmingly by the House of Representatives on October 5, 1981.

A. Legislative History of §2 of the Voting Rights Act

1. Congress Intended an Effects Standard be Applied Throughout the Act

Whether Congress merely restated the 15th Amendment in enacting section 2 of the Voting Rights Act in 1965 is debatable. It is certainly reasonable to conclude, as the House of Representatives has, that Congress intended the same standard of proof to be applicable throughout the Act.

Where the Voting Rights Act specifically states the standard of proof to be used by the courts or the Attorney General in determining whether or not the Act has been violated, it consistently uses a purpose or effects standard.[1] Some sections, such as section 2 and section 12,[2] speak neither to a purpose or effects standard. The structure of the Act and the legislative history provide no basis for concluding that a different standard should be incorporated into section 2. It is important to note that neither the opponents nor the proponents of the 1965 Act inferred that section 2 only reached purposeful abridgements of the right to vote. Furthermore, no member of Congress questioned the appropriateness of the purpose or effect standard where it was explicitly set forth in the Act.[3] Consequently, it is reasonable to assume that Congress intended that a purpose or effects standard be applied in all sections of the Act except where otherwise provided.

A review of the legislative history of the 1970 and 1975 extensions of the Act bolsters this assumption.

In 1970, then Attorney General John Mitchell proposed amendments to the Act which would, among other things, repeal sections 4 and 5. In making this proposal, he suggested the Attorney General's power would be broadened to institute lawsuits anywhere in the country to enjoin practices or procedures "which has the purpose or effect of denying or abridging the right to vote on account of race or color..."[4]

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[1] The only exceptions are in Sections 11(c) and (d) which refer to prohibition of false registration.

[2] Section 12 provides civil and criminal penalties for depriving any person of any rights secured by the Act.

[3] For a fuller discussion of this point and of the legislative history of the Voting Rights Act generally see Amicus Curiae Brief for the United States in Lodge v. Buxton, 639 F2d 1358 (1981).

The Senate rejected these amendments. In opposing the amendments, ten Senators, including seven who were sponsors of the 1965 Act, set forth separate views endorsing the statement by the U.S. Commission on Civil Rights that the proposal to give the Attorney General enforcement power nationwide would add nothing to the Act since "the Attorney General already has the authority to bring such suits" under sections 2 and 12(d).[5] While the House had adopted the Mitchell amendments, it was the Senate bill, with modifications, which eventually became the Voting Rights Amendments of 1970. Section 2 remained as originally adopted in 1965.

In 1975, Congress amended section 2 to assure that language minority citizens would also have available the protections afforded under that section. During its deliberations, Congress did not discuss any intent to change the standard of proof to be used under that section.

Thus, it can be reasonably inferred from the legislative history that Congress intended that a purpose or effects standard be applied consistently throughout the Act.

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[4] Proposed Amendments to VRA of 1965: Senate Hearings S. 2507 Before the Subcommittee on Const. Rights of the Judiciary Committee, 91st Cong., 1st and 3nd Sess. 538 (1969-70) [hereinafter "1970 Senate Hearings _"]; Proposed Amendments to the VRA of 1965: Hearings on H.R.4249 before the Judiciary Committee 91st Cong., 1st and 2nd Sess. 282 (1969-70) [hereinafter "1970 House Hearings].

[5] Joint views of Ten Members of the Judiciary Committee Relating to Extension of the VRA of 1965, 116 Cong. Rec. 5523,5527 (1970).

The special provisions of the Act, primarily section 5, cover only limited jurisdictions in the country because they require automatic submission and review of all changes in election practices or procedures and because they shift the burden of proof to those who Congress found had evidenced a history of discrimination against minorities.

2. Section 2 Incorporates Fifteenth Amendment Standard

The *Mobile* plurality opinion claims that "the sparse legislative history of section 2 makes clear that is was intended to have an effect no different from that of the Fifteenth Amendment itself."[6] If one accepts that to be Congress' intent, then one must further determine what the 1965 Congress understood the Fifteenth Amendment to mean.

Since the U.S. Supreme Court had not yet ruled in 1965 that a constitutional claim requires proof of discriminatory purpose, the argument that by section 2 Congress did no more than restate the Fifteenth Amendment is not inconsistent with the claim I made earlier that Congress intended a purpose or effects standard to be used in section 2. In fact, it was not until 1976, in *Washington v. Davis*, 426 U.S. 229, that the Supreme Court made clear for the first time that to uphold a claim of a constitutional violation, proof of intentional discrimination was required. Accordingly, based on the case law developed through 1965, it would have been reasonable for Congress to believe that in enacting the 1965 Voting Rights Act as a parallel to the Fifteenth Amendment, it was proscribing purposeful discrimination, as well as practices which had discriminatory effects.[7] Furthermore, since Supreme Court decisions from 1965 to 1975 continued to suggest that discriminatory purpose was not necessary to support a Fifteenth Amendment violation, there was no reason for Congress to believe, when it acted in 1970 and again in 1975, that the prohibitions of section 2 had in any way changed.[8]

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[6] *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980).

Moreover, federal courts have interpreted section 2 as incorporating an effects standard. *See e.g.*, *Brown v. Monroe*, 428 F. Supp. 1123,1139 (S.D. Ala.1976); *Gremillian v. Rinaudo*, 325 F. Supp. 375,377 (E.D. La.1971); *Brown v. Post*, 279 F. Supp. 60, 63 (W.D. La.1968) (all held that section 2 of the Act prohibits any voting practice or procedure that either by design or effect operates to deny or abridge the right to vote).

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[7] *See*, *e.g.*, *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965) (indicating that the Constitution prohibits practices that "designedly *or otherwise*" operate to dilute or cancel out the voting strength of racial or political elements of the population); *Gomillion* v. *Lightfoot*, 364 U.S. 339, 341 (1960) (allegations in complaint stated a Fifteenth Amendment violation where the "inevitable *effect*" of a boundary change was to remove most of the Negro voters); *NAACP* v. *Alabama*, 357 U.S. 449, 461 (1957) (the "abridgement of [indispensible liberties] . . . *even though unintended*, may invariably follow from varied forms of governmental action"); *Lane* v. *Wilson*, 307 U.S. 268, 275-76 (1938) (the Fifteenth Amendment prohibits "onerous procedural requirements which *effectively* handicap exercise of the franchise by the colored race") (emphasis added); For a more detailed discussion of the case law prior to 1965, see Statement of Frank R. Parker before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, On the Extension of the VRA of 1965, February 11, 1982.

[8] *See*, *e.g.*, *United Stated v. O'Brien*, 391 U.S. 367 (1968) (interpreting *Gomillion v. Lightfoot*, *supra*, as turning on discriminatory effect, not discriminatory purpose, of the challenged redrawing of municipal boundaries); *Palmer v. Thompson*, 403 U.S. 217, 224-225 (1971) (relying on O'Brien to justify refusing to inquire whether a city's purpose in closing its swimming pools was to avoid racial integration). *See also* statement of Frank Parker, February 11, 1982, *supra*.

B. Pre-Mobile Case Law

The nexus between section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments in voting rights litigation has aptly been described as follows:

> the test under amended section 2 was built up in a number of cases, some of which intermingled concepts of section 2 and the 14th and 15th amendments. By and large these have been used in the same way, and many cases have included claims brought under the first, 13th, 14th and 15th amendments and section 2 and 42 U.S.C. §1971. Because the applicable principles draw from each of these sources of law, it is not useful to go back and try to create separate lines of authority.[9]

Thus, a determination of the status quo in voting rights litigation cannot be understood without reference to key voting rights opinions by the lower federal courts and the U.S. Supreme Court regardless of whether the outcome of such cases is based on Thirteenth, Fourteenth, or Fifteenth amendment claims or on statutory claims.

Before Mobile, the standards applied by the lower federal courts were those enunciated in White v. Regester, 412 U.S. 755(1973) and Zimmer v. McKeithen (1973) supra.[10] In White, the Court looked to the "totality of the circumstances" to determine whether the challenged system effectively shut racial minorities out of the process. The White Court also affirmed the trial court's "intensely local appraisal" of the total circumstances. The factors which the Court looked to in determining whether or not there was a violation included: the effect of racially polarized voting, the fact that the group allegedly discriminated against had not elected members of their group to office; a history of official discrimination; indifference or unresponsiveness by elected officials to the needs and interest of minorities; and exclusion of minorities from the electoral process. The Court made clear that each factor need not be individually proven. The existence of one of these factors alone would not be sufficient to find a violation. The Fifth Circuit Court of Appeals' opinion in the Zimmer case, which has guided the lower courts since 1973, was based on the White standards.

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[9] Armand Derfner, Director, Voting Law Policy Project, Joint Center for Political Studies, Before the Subcommittee on the Constitution of the Committee on the Judiciary, U.S. Senate, February 2, 1982.

[10] For detailed, expert review of the case law prior to the Mobile decision, see hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, Ninety-Seventh Congress, First Session, on Extension of the Voting Rights Act, 1981. See also prepared statements before this Subcommittee by Frank Parker and Armand Derfner, supra, and by David Walbert, Esq., Former Law Professor, Emory University, on February 1, 1982.

In 1976 and 1977 the Supreme Court held that the Constitution required proof of intentional discrimination to establish a violation. Washington v. Davis, (1976), Supra, and Arlington Height v. Metropolitan Housing Development Corp, 429 U.S. 252 (1977). The Fifth Circuit, which is most active in vote dilution cases, attempted to blend these two cases with the earlier vote dilution cases.

The Supreme Court plurality opinion Mobile acknowledged that until Washington v. Davis it was not understood that proof of intent was required to show a constitutional violation; the "misunderstanding" in Zimmer, according to the plurality, was that "proof of discriminatory effect was sufficient."

While holding that the presence of the Zimmer factors are insufficient to prove a purposeful violation, the Mobile opinion reaffirmed its White v. Regester decision ignoring the fact "...that Zimmer articulated the very factors deemed relevant by White v. Regester and Whitcomb v. Chavis..."[12] The Mobile plurality examined each of the factors which the White court looked at and found that each was insufficient by itself to prove purposeful discrimination. In so doing, the Mobile plurality ignored its White holding that those factors are relevant, not individually, but in the aggregate in determining the "totality of the circumstances" in an individual case.

The characterization of the White factors as insufficient to prove a constitutional violation is one of the most disturbing aspects of the Mobile plurality opinion since it now "...leaves the courts below adrift on unchartered seas with respect to how to proceed..."[13]

Section 2 Amendment to H.R. 3112 and S.1992

As the original sponsor of the House bill to extend and amend the Voting Rights Act of 1965, I would like to correct some misconceptions which have been raised before your Subcommittee.

First, the section 2 amendment, which was adopted by the House, and is included in S. 1992, was , as I said above, part of H.R. 3112 from the time it was introduced in the House on April 7, 1981. It was not an "after thought" as implied by the Attorney General in his testimony before your Subcommittee.

Second, the language of section 2, together with the House Committee Report language, state clearly that the standard it adopts is that which the courts had applied prior to Mobile, i.e., the White v. Regester standard.[14]

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[12] Justice White dissent, City of Mobile v. Bolden, at ___.

[13] Id.

[14] See July 14, 1981 letter from Peter W. Rodino, Chairman, House Judiciary Committee to Congressman Don Edwards, Chairman, House Judiciary Subcommittee on Civil and Constitutional Rights in House Hearings, p. 2025.

The Mobile plurality claims that White required proof of intentional discrimination and, thus, is not inconsistent with Mobile. Regardless of whether White is now characterized as a purposeful or an effects/results test, the fact is that, in following White, lower courts examined the types of objective factors White said were relevant to a constitutional claim in determining whether the "totality of the circumstances" yielded a violation. The Mobile plurality examined each of the White factors but rather than apply the "totality of the circumstances" test, it said that each factor, by itself, was insufficient to prove a constitutional violation.

The section 2 amendment adopted by the House would return the focus of the courts' review to the White standards.

The amendment also incorporates the White holding, which has been reiterated consistently by the lower courts and the U.S. Supreme Court, that

> it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence that the political process leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity, than did other residents in the district to participate in the political processes and to elect legislators of their choice.[15]

Thus, the argument that the enactment of the section 2 amendment of H.R.3112 and S.1992 will lead to proportional representation is simply wrong. The language of the amendment is absolutely clear that the lack of proportional representation by itself does not constitute a constitutional violation. Again, this is consistent with White and numerous other court cases, including Mobile, which state that the lack of representation factor is only one of many factors to be examined in making a determination.

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[15] White v. Regester, supra, citing Whitcomb v. Chavis, 403 U.S. 124, 149-150.

Further, the section 2 amendment, does not mandate proportional representation as a remedy once a violation has been established. The case law, the legislative history in the House, and the testimony before your Subcommittee from experts in this field make this fact absolutely clear See, especially statement of Frank Parker, supra. Claims to the contrary are simply speculation not based on reality.

Lastly, it needs to be reiterated that the White results test incorporated into section 2 refers not, as some have erroneously argued, to the results or outcome of a particular election but to the effect or result which a challenged election practice or procedure has in providing -- or denying -- equal access to the political process for those minorities who are protected by the Voting Rights Act. It bears repeating once again, that such result is determined by examining the numerous factors set forth in Whit [illegible] see if the "totality of the circumstances" in a particular case yields a violation under section 2.

It is interesting to note that witnesses who have raised these claims before your Subcommittee have no expertise in voting rights litigation,and, thus, their claims lack credibility since they are no more than conjecture.

I was present at the birth of the Voting Rights Act. I know the Congress never intended that the law require two different standards of proof. In paraphrasing section 2, the House report on the law used language that clearly shows we did not mean to limit the act to purposeful violations of the right to vote. The report said that section 2 guaranteed the "right to be free from enactment or enforcement of voting qualifications...which (emphasis mine) deny or abridge the right to vote on account of race and color." Obviously, we did not mean that intent had to be proved.

I find it ironic that the attorney general in his testimony to this subcommittee on January 27, 1982, used similar language to state correctly--although inadvertently, he subsequently shows--the true original meaning of section 2.

On page 2 of his prepared statement, he notes:

"...The permanent provisions, which apply nationwide, include section 2 of the statute which (again, emphasis mine) generally forbids electoral devices and procedures that deny or abridge the right to vote because of race, color, or (since 1975) membership in a language minority group."

Congress always intended that the same standard of proof be applicable through the Act. The House-passed language of section 2 reinforces that meaning.

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PREPARED STATEMENT OF GOVERNOR BRUCE BABBITT OF ARIZONA

I am the Governor of one of the States covered by the "preclearance" requirements of the Voting Rights Act of 1965. Almost a year ago, when the future of the Act was in real doubt, I wrote the members of this Committee and the members of the House Judiciary Committee to urge that the provisions of the Act be extended. The House responded admirably to the task before it, acting not only to extend but to strengthen the crucial piece of legislation. It is time for the Senate to finish the job.

The right of the citizenry to vote is the single characteristic which most distinguishes our representative form of government from the tyrannies which rule most of this planet's inhabitants. And, in my opinion, the Voting Rights Act of 1965 has been the most effective tool for implementing the promise of the Fifteenth Amendment to the Constitution that the right to vote shall not be denied on the basis of race or color.

When the Act was first passed, the "right" to vote was a right in name only in many areas of this country; access to the voting booth was routinely denied to Hispanics, Blacks, and Native Americans. A scant 17 years later, a dramatic change has taken place -- these groups are beginning to use the power of the ballot to attain their rightful place in our democratic society.

The State of Arizona can serve as a dramatic case in point. In 1964, the Arizona Legislature consisted of 79 representatives and 28 senators. Of these 107 legislators, only eight were Black or of Hispanic ancestry; none was a Native American. Today, the Arizona Legislature consists of 60 representatives and 30 senators, a total of 17 less than in 1964. Yet we are represented by 12 Mexican American legislators, two Blacks, and three Indians. In short, the minority representation in the Legislature has more than doubled, even as the total membership of the House and Senate was reduced.

To be sure, several factors contributed to this progress -- demographic trends, reapportionment, and the individual abilities of the legislators elected. But central to the Arizona story --which has been repeated elsewhere -- is the increasing participation of Hispanics, Blacks, and Indians at the ballot box. And, the dominant fact in that increased participation has been the assurance of the federal government -- through the Voting Rights Act of 1965 --that it takes seriously the words of the United States Constitution.

While much progress has been made, much remains to be done. The national experience with redistricting and reapportionment this year reminds us with stark clarity that methods less violent than the police dog and the billy club can be used to deny the effective use of the ballot. Artful manipulation of district lines or registration requirements can so dilute the right to vote that its value becomes virtually nil. And, while this country has progressed far past the shameful era where some of its citizens were flatly barred from exercise of the franchise, the files of the Justice Department over the past decade bear potent witness to the fact that many less direct barriers to effective minority participation still remain.

It is for this reason that I support enthusiastically the steps taken by the House to strengthen the Voting Rights Act. In 1980, in the case of City of Mobile v. Bolden, the Supreme Court held that minority voters challenging a voting law must prove that the law was adopted or retained with conscious intent to discriminate. I believe, as do many legal scholars, that the City of Mobile decision was bad law, contrary to prior reasoned opinions of the Court. But, whatever the merits or demerits of the City of Mobile decision as statutory interpretation, the engrafting of an intent requirement onto the Voting Rights Act is bad policy.

First, a requirement that a voter prove intent to discriminate as a prerequisite to invoking the Act's protections will make it virtually impossible to attack most biased voting schemes. In most States -- as in Arizona -- no detailed legislative history is kept. It is impossible to reconstruct the intent or purpose of legislation adopted last year -- let alone that enacted decades ago. Even in the extremely rare instances where legislators can be found who recall an enactment's history, the doctrine of legislative privilege shelters the lawmaker from effective cross-examination. And, in States --such as Arizona -- where many laws are adopted through use of the initiative or referendum, divining the purpose of a particular bill may require no less than a mind-reading of the electorate at large.

The legal effect of imposing proof of intent on the attacking discriminatory voting schemes is to restrict the scope of the Act to the instance where a "smoking gun" can be located. These will be exceedingly rare, since even the most bigoted officials hardly pride themselves on the public disclosure of such bias. As a result the Act will be reduced to a legal curiosity, invoked in only the most egregious instances. This is an inappropriately law estate for such a critical piece of legislation to fall.

Secondly, and more important, the intent requirement is simply inappropriate in this circumstance. The criminal law often imposes an intent requirement as a method of making certain that a punishment is not imposed unless a wrongdoer acted willfully. But the basic intent of the Voting Rights Act is not to punish, it is a remedial bill, designed to assure to American citizens the ability to exercise the franchise effectively. The Act is not simply for the benefit of minorities, it is for the benefit of all Americans. When Hispanics, Blacks and Native Americans participate in the democratic process, it is society as a whole that is the winner. That has been the experience in Arizona, where the State and all of its citizens have gained immeasurably from the increased participation of minorities in the democratic process.

There is simply no valid reason to restrict the benefits of the Act to those instances where the discriminatory action can be shown to be purposeful. The essential question to the person whose vote is diluted is whether the law or practice at issue is discriminatory -- it is rendered no less odious simply because the discrimination was thoughtless, as opposed to intentional. And, the public at large should not be deprived of the substantial benefits of the Act by virtue of such unnecessary technicalities.

I understand that some fear that the House bill will require the imposition of racial quotas or "proportional representation." That fear should be dispelled by the language of the bill itself, which reads: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section." It is difficult to imagine a more effective safeguard against racial quotas than language which expressly disavows the intent to impose such quotas, and a legislative history which abjures such a purpose.

The unique promise of our form of republic is that, in Abraham Lincoln's memorable phrase, we have a "government of the people, by the people, and for the people." The Voting Rights Act is proud testimony of the federal government's commitment to Lincoln's ideal. The Senate should not retreat one iota from that commitment; it should act immediately to finish the job so ably begun by the House, and pass the extension of the Voting Rights Act.

PREPARED STATEMENT OF CHANDLER DAVIDSON, CHAIRMAN, DEPARTMENT OF SOCIOLOGY, RICE UNIVERSITY, HOUSTON, TEXAS

The extension of the Voting Rights Act of 1965 is now before Congress. Precisely what form the extension takes will greatly influence the chances of covered minority groups for fair representation in government.

As a student of minority-group politics for 15 years, whose research specialty is electoral politics, I believe that the House version of that extension is essential for the achievement of fair representation of minority groups in the areas of the country I know best--the South and Southwest.[1] The amendment to Section 2 of the Act, as contained in H.R. 3112, is not only constitutionally sound but absolutely necessary for the abolition of minority vote dilution, a practice that has been widely employed in the South and Southwest since the 19th century to diminish--often to the vanishing point--the political power of ethnic minority groups when they attempt to use the franchise to redress the effects of historical and current discrimination against them.[2]

The Exclusion of Minorities from the Political Process

Today, in those areas of the country where discrimination has historically been massive, long-lived, and extreme, minorities are still severely underrepresented in local government. In the southern states covered continuously by the Voting Rights Act since 1965, after hundreds of years of slavery and a century of subordination in a racial caste system, Blacks still account for a minuscule proportion of elected officials. In 1980, of 32,977 elective offices in these seven states (Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia) only 1,830 (5.6%) of them were occupied by Blacks, and the proportional increase since 1965 had begun to taper off by the mid-1970s.[3] The total population of these states is 25.8% black. In the words of the Joint Center for Political Studies, which tabulates the number of black elected officials, "Currently, unfavorable electoral arrangements like at-large elections and some racial gerrymandering are major obstacles to further rapid gains by Blacks in winning elective office in the South."[4]

If 5.6% of the elected officials in these seven states is black, while 25.8% of the population is black, then only a fraction as many Blacks hold office as would be likely in a race-free society. Suppose that the shoe were on the other foot, i.e. that in those same states, the proportion of white officials were reduced to the point where it comprised only one-fifth the number one would expect on the basis of the white percentage of the population. In other words, suppose that the white proportion of elected officials dropped from 94.4%--the current percentage--to about 15%, which is one-fifth of the white percentage of the population in those states. Does anyone believe that whites in that instance would not see this as evidence of massive and intolerable exclusion?

The situation of Mexican Americans in the Southwest is comparable to that of Blacks in the South. Mexican Americans have historically been the victims of violence, state-sanctioned segregation in schools and housing, "Jim Crow" practices, and job discrimination. Yet still today they are widely excluded from all meaningful participation in local politics. An analysis of all persons who served as members of city councils in Texas from 1968 to 1978 revealed that less than 6% were Mexican Americans, in a state with a 1980 Spanish-origin population of 21.0%. Even in South Texas, where Mexican Americans comprise a majority of the population, less than one-third (31.7%) of city council members during this period were Mexican Americans. In reporting these figures, the Texas Advisory Committee to the U.S. Commission on Civil Rights remarked, "It is significant... that even today 179 (83.6%) of the 214 larger cities in Texas have at-large elections for city council."[5]

The pointed reference to at-large elections both by the Joint Center for Political Studies and the Texas Advisory Committee reflects a strong consensus among students of electoral politics that a major barrier to minority political representation is the existence of electoral rules which, in combination with bloc voting among whites, make it virtually impossible for minorities to elect candidates of their choice, even when minority turnout is relatively high, when there are no formal barriers to registration and voting, and when there is no formal impediment to minority candidates standing for office.[6]

These electoral practices include at-large elections, run-off requirements, anti-single shot rules or their equivalent, the numbered place voting system, and racial gerrymandering, among others. In many jurisdictions that I have had the opportunity to observe, several of these structures are used in concert, providing the framework within which a highly unified white vote overwhelms an equally unified but smaller minority vote to insure defeat of the latter's preferred candidates. Elective office, a major avenue to political influence, is thus made "off limits" to the minority community. When no alternative avenue to influence exists--and this is often the case--minority vote dilution is said to exist.

In such cases, the minority community is not "underrepresented" in the weak sense that it is simply unable to elect its preferred candidates in rough proportions to its percentage of the population. Rather, the minority community is frozen out of the political process altogether. Unlike Republicans or Democrats, who sometimes find themselves underrepresented in this weak sense, Blacks in the South and Mexican Americans in the Southwest are impoverished, historically subordinated peoples who occupy the position of an excluded group. In local settings they are isolated in segregated neighborhoods, refused entry into the clubs and friendship networks within which informal influence can be exerted, and, given their lack of schooling and their relative shortage of funds, are at a great disadvantage in establishing effective organizations and voluntary groups of the kind that members of the white majority often utilize when they find themselves disadvantaged in electoral politics.

In my research on municipalities, I have listened to literally hundreds of minority leaders and activists complain of an almost total involuntary isolation from the political life of their community. It is this underrepresentation in a strong sense that I refer to as vote dilution. It is an inability of minority groups in many communities to gain even the merest foothold in the political system.

The minuscule proportion of elected minority officials today--seventeen years after the Voting Rights Act of 1965 was passed--is indicative of widespread vote dilution. Given the fact that a significant proportion of all elected Black and Mexican American officials have won office in the relatively few cities and counties with overwhelmingly minority populations--the so-called "black belt" regions and the "brown fringe" in South Texas--the statistics on elected officials understate the extent to which, in many, many cities, counties, and school districts with sizable minority populations there are no minority officials at all. A systematic survey of such jurisdictions, I am convinced, would reveal that great numbers of them exemplify the kind of extreme political isolation that I refer to as minority vote dilution. It is this situation, and not the negligible problem of slight underrepresentation on governmental bodies of the sort that Democrats and Republicans sometimes become embroiled over during redistricting battles, that Congress must address itself to. In blunter terms, it is not "underrepresentation", but virtually no representation, that the proposed amendment to Section 2 is intended to rectify.

The Theory of the Swing Vote

It is sometimes alleged that while at-large elections and concomitant dilutionary devices may prevent minorities from electing people of their choice to office, a "swing vote" wielded by the minority community will give it an appreciable influence over candidates who are elected to office, even if these candidates are not among those preferred by the minority community. This theory rests on two major assumptions: a) that the minority vote is typically decisive to the electoral outcome, or, in other words, that the votes cast by the minority community are necessary to the winners' victory; b) that when the first assumption is correct, the winning candidates will then be receptive to the wishes of their minority constitutents, or they may lose the next election.

The first assumption, however, is by no means always true. In Houston, where I live, Blacks in recent years have constituted about one quarter of the population, and in city elections they have had a turnout rate that is about the same as that of whites. An analysis of voting patterns over a 20-year span (from 1955 to 1975) revealed that the margin of victory among winning council candidates under the at-large system was typically so great that the black vote, even when unified behind a candidate, was unable to affect the outcome of all but five council races out of 77. In other words, the black voters could have stayed at home in 72 races, and if the whites' voting pattern had remained unchanged, the same candidates would still have been elected. A similar analysis of voting patterns between 1955 and 1981 in Abilene, Texas--a city with a combined Black and Mexican American population of about 18% during this period--indicated that the minority bloc could have made the difference in election outcomes in only 15 of 68 contests. Since 1970, the minority bloc could have affected the outcome in only 3 out of 28 cases.

More to the point, even when the first assumption underlying the "swing vote" theory is correct, it does not necessarily follow that winning candidates will pay attention to the interests of the minority community simply because their votes made a difference. The reason is that white votes also make a difference--and often more white votes are cast for the winning candidate than black votes. Thus, in a community where there is strong racial polarization, the pressure brought to bear by the white constitutents of a winning candidate may be so great as to nullify the pressure on him from minority constituents.

In recent city commission elections in Mobile, Alabama, two commissioners who could not have won election without the votes they received from Blacks specifically disavowed the notion that the black vote had been "decisive" in their election.[7] And given the continuing highly polarized racial situation in that city, it seems unlikely that the Blacks' "swing vote" will enable them to have much more success in influencing their elected officials than they have had in the past.

In summary, the "swing vote" theory may possibly have application in some cases. But in locales where minorities have yet to win a single office, and where racially polarized attitudes are intense, the swing vote will probably not provide minorities leverage.

The Effects of Vote Dilution on Minority Participation

Faced with almost total exclusion from the orginary channels of political participation, and lacking any alternative means of exerting influence, voter turnout and candidacy rates tend to drop in the minority community.[8] This is not an expression of apathy, however. It reflects a realistic appraisal of the facts by minority voters. If electoral rules and white bloc voting constitute a stacked deck, why continue to play the game? In Abilene, Texas, minority candidates first ran for municipal office in 1970. In spite of several tries during the decade, none was able to win election without the endorsement of a powerful slating group dominated by the white Anglo "establishment". By 1979, the black and brown communities had virtually stopped participating in electoral politics. In city council elections that year, a study of electoral participation revealed that only 76 Mexican Americans and 31 Blacks voted, out of a minority population of approximately 19,000.[9]

The case of Abilene exemplifies a particulary disturbing development. In many Southern and Southwestern communities the passage of the Voting Rights Act brought about an initial surge of political participation by minorities, who were able for the first time in their lives to overcome barriers to the voting and registration process such as literacy tests, poll taxes, and physical intimidation. The existence of dilutionary mechanisms, however, has forced newly-enfranchised voters to acknowledge that the old system of racial dominance is still in place. Minorities can now vote--they just cannot cast a meaningful vote. This is the essence of vote dilution. If the proposed amendment to Section 2 fails, it is possible that minorities in many jurisdictions will gradually lose hope that the electoral process offers them a fair chance for representation in local government.

The case of Taylor, Texas, is instructive in this regard. Taylor is a farming town of 10,000 people located near Austin, the state capital. Twenty percent of its population is Black, and another 16 percent is Mexican American.

The town is in central Texas, not far South enough towards the Mexican border for its Chicanos to have caught the fever of militancy that in the 1970s spread out in waves from Crystal City through the medium of La Raza Unida party. Nor is it far enough east for its Blacks to have shared the hopes of their race in some of the Texas Black Belt counties for achieving significant political power through the mobilization of sheer numbers.

Nevertheless, in the 1960s, leaders of both groups in Taylor hoped that the winds of change blowing across the South and Southwest after the passage of the Voting Rights Act would kick up a little dust in their town, too.

It was obvious to impartial observers that major changes were needed. As in most Texas cities, the minority population was socially and economically deprived, when compared with its white Anglo counterpart. This deprivation could be traced directly to the historical discrimination against both Blacks and Mexican Americans and to their long exclusion from meaningful political participation. The special disabilities created by discrimination resulted in special needsthat, in any equitable theory of justice, placed special obligations on the city government.

Only in 1965 was the first minority person appointed to a Taylor city board, and he remained the sole minority representative into the 1970s. No Blacks or Mexican Americans had been appointed as city election officials. Most minority employees on the city payroll held the least desirable, lowest-paying jobs and none worked at city hall. The town's three housing projects were totally segregated.

Officialdom's neglect of minority neighborhoods was reflected in the poorly-maintained streets, the run-down status of the park compared to the one "on the other side of the tracks", and the city's refusal to heed requests for increased recreational equipment at the housing projects and refurbishment of a neighborhood center. As early as 1961 minority spokesmen had asked for a fire station in their area--a request that has not been acted on at this writing, although a substation was later built in an Anglo neighborhood in the interim. Serious allegations of police misconduct toward minorities were ignored by the city government.

In 1967 minority leaders decided that the time had come to use the electoral system to help remedy their problems. They got together, black Baptists and brown Catholics--not what one might think of immediately as a compatible ethnic stew--and agreed that the arithmetic of the situation dictated a united front in local elections. The newly formed coalition put forward one of their most personable and qualified candidates, Paul Sanchez, to campaign for city commissioner. Sanchez was the first minority candidate ever to run for Taylor's commission. The city required at-large rather than district-based elections. Sanchez was defeated by an Anglo candidate, although he apparently received the overwhelming majority of votes in both minority communities.

Three years later another Chicano ventured forth, again with bi-ethnic backing. Gumie Gonzales, moreover, brought the first sophisticated political campaign to Taylor. Having spent some time in the highly-politicized climate of nearby Austin, Gonzales used telephone banks, door-to-door canvassing, and the solicitation of endorsements from most of the ethnic preachers and lay leaders in Taylor. He lost.

In 1971, Tommie Rivers, a Black, ran for office and, per agreement, no Chicano ran that year. He lost. In 1972 two Chicanos and a Black ran. None was elected. The voter turnout that year was the largest in the city's history.

Once more, in 1974, a black ran for a commissioner's seat, with bi-ethnic support. He lost. That was the last time a minority candidate ran for municipal office in Taylor.

During the period from 1967 to 1974, voter turnout was 50% higher in contests where minorities challenged whites than in those where only Anglos contended. By all accounts the ethnic community turned out in unprecedented numbers in those elections. But Anglos, responding to the challenge, trooped to the polls as well, rallied, in several instances, by the local newspaper, whose special election-day editions hinted darkly of heavy minority turnout.

In the years since 1974, no white candidates have made overtures to the minority community. No campaign promises in return for votes have been made to ethnic leaders. The minority community has been excluded from the municipal political system in Taylor. In the late 1970s minority registration was low, and actual voter turnout, when compared to the Anglo rates, even lower. The winds of change seemed to have passed the city by.

A few of the minority leaders still were unwilling to give up, however, and they brought a vote dilution suit in the mid-seventies arguing that at-large elections prevented minorities from electing candidates of their choice. It had just been put on the trial docket in the spring of 1980, when the Supreme Court delivered its decision in City of Mobile vs. Bolden, declaring that only intentionally-created dilutionary structures were unconstitutional.

That decision presented serious problems to the plaintiffs in Taylor. The at-large election system had been established there in 1914. Lawyers for the plaintiffs quickly ascertained that the files of the local newspaper only went back to the 1930s, and that official city documents relating to the 1914 charter revision shed no light on the motives for the change. After much soul-searching, they advised their clients to drop the suit, flushing down the drain about three years of trial preparation, as well as the lingering hopes of politically active Blacks and Mexican Americans in the town that the U.S. Constitution might provide them relief.

Taylor is not alone among cities in the South and Southwest that find themselves in a comparable situation in the wake of Bolden. After having won the franchise at such great cost, Blacks and Mexican Americans in many localities have discovered that it is of no value as a political tool at the county and municipal levels. And the Supreme Court has now told them that neither the 14th nor the 15th amendment guarantees them the right to cast a meaningful ballot, when it cannot be shown that the men who adopted the dilutionary electoral system did so with the purpose of robbing their vote of its power.[10] It is hardly surprising, under these circumstances, that minority participation in local politics is declining in some areas.

The Issue of Bloc Voting

A commonly-voiced objection to single-member district remedies is that they perpetuate bloc voting. Two observations must be made on this score. First, the persistence of ethnic bloc voting (not simply that of whites and blacks, but of Jews, the Irish, Poles, Italians, and other "white ethnics") is an American phenomenon of long standing which shows little signs of abating, and will probably be with us for a long time to come.[11] Second, the existence and intensity of bloc voting apparently have very little to do with the kind of election system in operation. A recent study of this phenomenon as it pertains solely to blacks and whites in the South indicates that "racially polarized voting" increased around 1970, and is very high indeed.[12] Some of the cities studied were at-large cities.

Far more important than whether single-member districts will pertuate bloc voting is the question whether at-large elections will allow bloc voting on the part of white majorities to prevent minorities from electing candidates of their choice. Under certain conditions, bloc voting is a sign of healthy cultural pluralism. But it becomes inimical to democratic representation when it is used by a white majority to prevent a historically discriminated again minority from gaining entry into the political system. This is precisely why single-member district systems are preferable in some circumstances: they guard against the deleterious effects of bloc voting.

Summary

Two of the nation's largest minority groups--Blacks and Mexican Americans--are still today very seriously underrepresented in the South and Southwest. This is a result, in large measure, of the lingering effects of past discrimination, current discrimination, and the presence of electoral practices combined with bloc voting that prevent minorities from breaking out of their political isolation and establishing a foothold in local political systems. Informal means of exerting influence, as well as the vaunted leverage of the "swing vote", are often not available to minorities as alternative routes to meaningful participation. They thus find themselves thoroughly isolated from the political system in many locales.

Unfortunately the Bolden intent criterion precludes a remedy for many of these cases. Section 2 of the Voting Rights Act, as amended in H.R. 3112, provides a remedy that is practicable. The criticism that it calls for a system of proportional representation is unfounded, as I have seen in the cases with which I am familiar. The criticism that single-member-districts perpetuate racially polarized voting is dubious. I strongly urge support of the proposed amendment to Section 2.

NOTES

1. This belief is based in part on scholarly research I have conducted on voting rights, and well as involvement in voting rights litigation.

Some of my publications are: Biracial Politics: Conflict and Coalition in the Metropolitan South (Louisiana State University Press, 1972); "Ethnic Attitudes as a Basis for Minority Cooperation in a Southwestern Metropolis," (co-authored), Social Science Quarterly (1973); "At-Large Elections and Minority Representation," Social Science Quarterly (1979); "Reforming a Reform," in Merle Black and John S. Reed (eds.) Perspectives on the American South (Gordon and Breach, 1981); and "The Effects of At-Large Elections on Minority Representation: A Review of Historical and Recent Evidence," (co-authored), The Journal of Politics (1981).

I have served as an expert witness or consultant in the following voting rights cases: Greater Houston Civic Council vs. Frank Mann; George Whitfield vs. The City of Taylor; Maria Velasquez vs. The City of Abilene, Texas; Rev. Roy Jones vs. The City of Lubbock, Texas; The City of Port Arthur, Texas vs. United States of America; Leila G. Brown vs. Board of School Commissioners of Mobile, Ala.; Wiley L. Bolden vs. The City of Mobile, Ala.; Rev. T. E. Walton vs. The North Lamar Independent School District, Texas; Seamon vs. Upham.

2. Among the many works on the historical use of facially neutral "reforms" to dilute the voting strength of minorities and the poor are the following: B. Rice, Progressive Cities: The Commission Government Movement in America, 1901-1920 (1977); S. Hays, "The Politics of Reform in Municipal Government in the Progressive Era," Pacific Northwest Quarterly (1964); J. Weinstein, The Corporate Ideal in the Liberal State, 1900-1918 (1968); J. Weinstein, "Organized Business and the City Commissioner and Management Movements, Journal of Southern History (1962); C. Davidson and G. Korbel, "At-Large Elections and Minority Group Representation: A Re-examination of Historical and Contemporary Evidence," The Journal of Politics (1981).

3. Joint Center for Political Studies, National Roster of Black Elected Officials, Volume 10, 1980 (1981), p. 7.

4. Ibid.

5. Texas Advisory Committee to the United States Commission on Civil Rights, Texas: The State of Civil Rights (1980), p. 47.

6. Among social scientists, there is an almost unanimous opinion that at-large voting disadvantages minorities. Among the numberous empirical studies which establish a link between at-large elections and minority-group under-representation are the following: C. Davidson and G. Korbel, op. cit.; R. Engstrom and M. McDonald,"The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship," American Political Science Review (1981); D. Taebel, "Minority Representation on City Councils," Social Science Quarterly (1978); T. Robinson and T. Dye, "Reformism and Black Representation on City Councils," Social Science Quarterly (1978); A. Karnig, "Black Representation on City Councils," Urban Affairs Quarterly (1976); C. Jones, "The Impact of Local Election Systems on Black Political Representation," Urban Affairs Quarterly (1976).

7. The Mobile Press, August 17, 1981, p. 1D.

8. There is evidence that the obverse is also true, i.e., that minority turnout increases when cities change from at-large to district systems. See Heilig and Mundt, "Do Districts Make a Difference?" The Urban Interest (1981).

9. These figures were compiled by me.

10. The facts on Taylor, Texas, were gathered through personal observation, interviews, and material in the files of the Legal Aid Society of Central Texas, Austin, Texas, in 1980.

11. R. Wolfinger, "The Development and Persistence of Ethnic Voting," American Political Science Review (1965).

12. R. Murray and A. Vedlitz, "Racial Voting Patterns in The South: An Analysis of Major Elections from 1960 to 1977 in Five Cities," The Annals of the American Academy of Political and Social Science (1978).

PREPARED STATEMENT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

EXTENDING THE VOTING RIGHTS ACT OF 1965: MAINTAINING BARRIERS TO UNLAWFUL DISCRIMINATION IN VOTING

by the Committee on Federal Legislation
and the Committee on Civil Rights

INTRODUCTION

The Voting Rights Act of 1965 1/ was adopted by overwhelming majorities of both Houses of Congress 2/ "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century." 3/ It is widely considered the most effective civil rights legislation ever enacted in our country. 4/ Just one measure of its success is the fact that the percentage of eligible black voters registered to vote in Mississippi increased from 6.7% in 1964 to 67.4% in 1976. 5/ This Association has supported the Voting Rights Act from the outset 6/ and has been gratified by its effectiveness. Today, some argue that, in light of the progress made under the Act since 1965, the Section 5 provision which requires covered jurisdictions to obtain prior Justice Department or court review of proposed changes in election qualifications or procedures should be allowed to expire as scheduled on August 6, 1982. These Committees reject such arguments and believe that the Act continues to be necessary and its extension vital.

The Voting Rights Act of 1965 adopts a variety of substantive standards and procedural mechanisms in its attempt to protect the "equal right to vote." 7/ Among the new remedies for voting discrimination contained in the Voting Rights Act of 1965 was the "prior clearance" provision in Section 5.

This provision was designed to inhibit the development of new devices to exclude black citizens from the electoral process by requiring that covered jurisdictions, those where a literacy test or other discriminatory device as a prerequisite to voting or registering was in effect and in which fewer than 50% of voting age persons were registered on November 1, 1964 or voted in the November 1964 presidential election, must obtain prior approval from the Attorney General (or the Federal District Court for the District of Columbia) for any proposed changes in election qualifications or procedures.8/ This Section 5 prior clearance requirement, like certain other provisions of the Act such as the one suspending literacy tests and certain other voting qualifications in covered jurisdictions, was to exist for five years.9/

In the Voting Rights Act Amendments of 197010/, Congress extended the Section 5 prior clearance provision for an additional five years,11/ brought under the Act's coverage states or political subdivisions which maintained any literacy test or racially discriminatory device in voting procedures as of November 1, 1968 and in which fewer than 50 percent of voting age persons had voted or registered in the November 1968 presidential elections,12/ and adopted a five year nation-wide ban on the use of literacy tests and other racially discriminatory devices.13/

In August 1975 Congress once more extended the Section 5 prior clearance provision of the Voting Rights Act, this time for seven years, until August 6, 1982.14/ At the same time, it broadened the Act to protect the voting rights of certain single language minority groups in political subdivisions where they constituted more than five percent of the voting age population so as to assure that such persons would have available to them election materials in the language they knew.15/

It is the anticipated August 6, 1982 expiration of the prior clearance provision, which currently applies to all or part of 22 states, that once more has brought the Voting Rights Act before Congress.

As noted earlier, the Voting Rights Act of 1965, as amended in 1970 and in 1975,[16] has been extraordinarily successful. Notwithstanding the Act's undeniable effectiveness in vindicating the constitutional right to vote, the U.S. Commission on Civil Rights, in its recent report on the Voting Rights Act,[17] reported that minorities "continue to face a variety of problems which the act was designed to overcome."[18] Particular problems cited by the Commission include the persistence of "harassment and intimidation of minority voters and candidates," and the failure to provide citizens in rural communities with accessible means for registration.[19]

Equality of access to the fundamental right to vote is not yet a reality. This is evident from the persistence in jurisdictions historically tainted by the "blight of racial discrimination in voting" of disparities between whites and blacks in numbers of registered voters, numbers of elected officials, and in most aspects of political life.[20] In short, the existence of continuing racial discrimination in voting procedures is so clear that it recently caused Representative Henry Hyde of Illinois, initially an opponent of extension of the Voting Rights Act, to change his mind: "I thought the need had passed. But there are yet places that try to obstruct the right of blacks to vote. You're being dishonest if you don't change your mind after hearing the facts."[21] The Committee on Federal Legislation and the Committee on Civil Rights of this Association unanimously support extension of the Voting Rights Act of 1965.

THE LEGISLATION

In April 1981, identical bills to extend and amend the Voting Rights Act were introduced in the House and Senate. The House bill, H.R. 3112, was sponsored by House Judiciary Chairman, Peter W. Rodino of New Jersey; the Senate bill, S. 895, was sponsored by Charles McC. Mathias of Maryland and Edward M. Kennedy of Massachusetts. On October 5, 1981 the House passed H.R. 3112 by the vote of 389-24, substantially in the form it had been reported out by the House Judiciary Committee.[22] The Senate is expected to consider legislation extending the Voting Rights Act of 1965 early in 1982. Current news reports indicate that 61 United States Senators support extending the Act in the form approved by the House in H.R. 3112.[23] On November 6, 1981, President Reagan issued a statement in support of extension of the Act.[24] However, the President urged that H.R. 3112 be modified to make it easier for states and jurisdictions to be relieved, that is, to be "bailed out" of Section 5 preclearance requirements and that H.R. 3112 be amended to provide that a voting practice may be successfully challenged under Section 2 of the Act only upon direct proof that it was adopted with the intent to discriminate.[25]

H.R. 3112, as passed, is directed at four separate and yet interrelated matters: (1) making the Section 5 preclearance provision, now due to expire on August 6, 1982, a permanent part of the Act; (2) liberalizing the ability of covered states and other jurisdictions to remove themselves from Section 5 preclearance coverage (*i.e.*, "bail-out") under Section 4(a); (3) amending Section 2 to prohibit the use of a discriminatory practice or procedure "which results in a denial or abridgment of" the right to vote on account of race or color or in violation of the protections afforded language minorities in the bilingual provisions without requiring direct proof that it was adopted with an intent to unlawfully discriminate (the so-called "effects test"); and (4) extending the Section 203 bilingual provisions, which currently are due to expire on August 6, 1985, for seven years to August 6, 1992.

SUMMARY OF RECOMMENDATIONS

A decade ago we firmly supported extension of the Voting Rights Act, and in particular commented favorably on the Section 5 preclearance requirements. As we stated then: "These remedies have proven far too effective in extending free exercise of the franchise to be abandoned at this time."[26/] Our comments then about the preclearance requirements are equally appropriate today. We also believe that strengthening the utility of the Section 2 civil litigation remedy, extending the life of provisions protecting certain single language minority groups and adopting a more viable "bail-out" provision are important additions to the Act. Accordingly, we -- like the House of Delegates of the American Bar Association[27/] -- endorse H.R. 3112 as adopted by the House and urge its enactment by the Senate as well. However, the Committees are divided in their support of the bail-out provisions of H.R. 3112, the Committee on Civil Rights supporting all of the prerequisites for bail-out set forth in H.R. 3112 and the Committee on Federal Legislation suggesting that certain details of the bail-out provision of H.R. 3112 be amended so as to encourage observance of voting rights by removing obstacles to bail-out which are not necessary to the protection of voting rights.

SECTION 5 PRECLEARANCE

The Section 5 preclearance requirements, which cover all or parts of 22 states, have become the cornerstone of the Voting Rights Act. Under Section 5, covered jurisdictions must preclear proposed voting changes to insure that they do not have the purpose or effect of denying or abridging the right to vote.[28] The objective of Section 5, which is to protect the gains that have been made under the Voting Rights Act,[29] has been well served. Through the entry of roughly 815 objections by the Attorney General since the Voting Rights Act was adopted in 1965 -- over 500 of which have been entered within the past five years [30] -- numerous discriminatory voting changes have been prevented from taking effect. Moreover, in our view, the very presence of the Section 5 preclearance requirements has undoubtedly deterred many covered jurisdictions from even proposing discriminatory voting changes. Thus, our opinion is that, coupled with an appropriate bail-out provision, the Section 5 preclearance requirements should be made a permanent part of the Voting Rights Act of 1965, as provided for in H.R. 3112.

Section 5 preclearance requirements apply to those states or political subdivisions which are identified by use of the "triggering formulae" set forth in Sections 4(b) and 4(f) of the Act.[31] Those covered are states and political subdivisions (1) which used a literacy test or a discriminatory device for registration or voting and (2) in which less than half of the voting age residents were registered for or voted in any of the 1964, 1968 or 1972 presidential elections.[32] Any such state or political subdivision is covered by Section 5 unless it has been exempted from coverage under the present Section 4(a) bail-out provision.[33] Presently, nine states and parts of thirteen others are covered by the preclearance requirements of Section 5.[34]

Section 5 requires each covered jurisdiction to obtain approval, either from the Attorney General of the United States or from the United States District Court for the District of Columbia, before it implements any change in its voting laws or procedures to ensure that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote."[35] Whenever a jurisdiction submits a change to the Attorney General -- the usual method of obtaining preclearance -- the Attorney General must object to the proposed change, if he intends to object, within 60 days of the submission (or within an additional 60 days if the Attorney General has requested additional information).[36] When a timely objection is not entered, the proposed change is deemed approved and may be implemented.[37] If an objection is entered, it is reviewable by a three judge District Court in the District of Columbia.[38]

Section 5 was originally enacted and twice extended partly to avoid the need for the difficulty and delay of voting rights litigation and partly to protect hard won court orders safeguarding voting rights from the attempts of offending jurisdictions to circumvent such orders by implementing subsequent discriminatory voting changes.[39] As summarized by the Supreme Court in 1980: "Case-by-case adjudication had proved too ponderous a method to remedy voting discrimination, and, when it had produced favorable results, affected jurisdictions often 'merely switched to discriminatory devices not covered by the federal decrees.'"[40]

Objections under Section 5 can have a considerable impact: an objection may be entered to a statewide redistricting plan, or upon receiving all of the necessary supporting information, the Attorney General can review and reject a submission proposing a multiple of changes within just 60 days.[41] Moreover, an objection entered by the Attorney General could be viewed as the equivalent of a successful lawsuit brought by the Justice Department or by private citizens, thus justifying the Congressional purpose of circumventing burdensome case-by-case adjudication and substantially relieving the federal courts of a class of litigation during a time of extreme court congestion. It appears self-evident that Section 5 has proven to be more expeditious and certainly more effective than the 100 years of litigation which preceded its enactment.

Section 5 is still necessary. Although the Act's ban on literacy tests and other discriminatory devices was chiefly responsible for its initial success, and notwithstanding the elimination of the more obvious past abuses such as poll taxes and direct intimidation of minorities, there remains today the actual and potential use of many voting rules and procedures such as annexations, redistricting, at-large elections and majority-win requirements, each of which may be unobjectionable in many instances, but each of which also may be subtly employed to render minority votes ineffective.[42/] Evidence of the continuing problems can be seen from the fact that Section 5 objections by the Justice Department have actually increased in recent years.[43/] Section 5 is still necessary to impede and deter covered jurisdictions -- those whose records contain indicia of past discrimination under the definitions of the Act -- from adopting voting procedures and qualifications that subtly or unsubtly deprive racial and language minority groups of the right to vote.

In our view, the prior clearance procedure is a relatively simple and notably inexpensive cost to bear for the resulting benefit. Under the administrative alternative permitted by Section 5, a covered jurisdiction need only mail a copy of the proposed voting change to the Justice Department, together with supporting information to show that the proposed change is not discriminatory either in purpose or in effect.[44/] In most cases, as the Attorney General of New York has testified, "with the exception of a routine cover letter, the submission generally includes only documents which had already been prepared as part of the process by which the bill was enacted into law. On the rare occasion when this information is insufficient, the additional information required can generally be transmitted by telephone."[45] The relative simplicity of administrative preclearance is underlined by a comparison with its alternative: litigation. In contrast to the burdensome and costly process of litigation, administrative preclearance is remarkably efficient and cost effective. The Section 5 staff of the Justice Department is comprised of only fourteen persons reviewing submissions under the supervision of Department attorneys.[46] There is no backlog.[47]

Whereas close to 35,000 Section 5 applications to the Attorney General have been made since 1965, only a few more than 815 have been objected to.[48] In our view, these statistics confirm the perception that Section 5 acts as a strong deterrent to the adoption of discriminatory changes.[49] They also indicate that the Attorney General has not objected lightly to changes in voting procedure proposed by covered jurisdictions but has acted judiciously in reviewing applications and objecting only to those evidencing an unlawful discriminatory purpose or effect.

Finally, we reject the suggestion made by some that Section 5 should be amended to exclude "insignificant" voting changes from the requirement of obtaining prior clearance.[50] First, what may appear on its surface to be an "insignificant" voting change (for example, moving a few polling places), may in fact have a very significant adverse impact on the right to vote (as where the polling places for black voters are moved to distant, hostile white neighborhoods).[51] Second, given the purposes for which Section 5 exists and the fact that it applies only to states and political subdivisions in which there is reason to believe that discrimination has infected the electoral process, it would be most unwise to invite the suspected offenders to decide in the first instance whether changes in voting qualifications or procedures are sufficiently "significant" to require Section 5 submission for prior approval.

In our view, Section 5 is the single most important provision in the Voting Rights Act. It has helped to protect against loss of the important gains that have been made in advancing the right to vote. It should not be weakened in any way. It should be made a permanent provision of the Act.

SECTION 4(a) BAIL-OUT

Under current law, a state or political subdivision once covered by the prior clearance requirements of Section 5 may bail out under Section 4(a) only if, in effect, it never should have been covered in the first place. Section 4(a) now provides that a jurisdiction may escape coverage under Section 5 only by obtaining from the United States District Court for the District of Columbia a declaratory judgment that, during the seventeen years preceding the filing of the declaratory judgment action, no "test or device has been used . . . for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees [given to members of language minority groups by Section 4(f)(2)]."[52] Thus, a state or political subdivision could take advantage of this bail-out only by showing that it has used no discriminatory test or device since before the time when the Voting Rights Act was passed.

While we believe that the preclearance requirements of Section 5 should be made a permanent part of the Voting Rights Act, we do not believe that every state or subdivision presently subject to those requirements should have to remain subject to them perpetually. Rather, we believe that a state or political subdivision should be permitted to "bail out" of the preclearance requirements upon a showing that it has substantially eliminated the problems which made it properly subject to preclearance in the first place.

This approach is not only fair to states and political subdivisions which may wish to relieve themselves from the preclearance requirements; it should also benefit the minority-group voters whom the Voting Rights Act was designed to protect. In our view it promotes the purposes of the Act by providing states and political subdivisions with an incentive to eliminate discriminatory rules and practices.

The subject of "bail-out" has been a focus of much discussion and controversy in recent months. There has been widespread support for the view that a state or subdivision should be permitted to "bail out" of the preclearance requirements by obtaining a declaratory judgment from the United States District Court for the District of Columbia that it has maintained what may be loosely called a "clean slate" for a period beginning ten years prior to the filing of its declaratory judgment action. We endorse this approach.

The more difficult problem is to determine what a "clean slate" is; this issue has been the subject of numerous, detailed legislative proposals. The proposal adopted by the House in H.R. 3112 provides that on or after August 5, 1984 a state or political subdivision wishing to bail out from the preclearance requirements would have the burden of showing that, for ten years preceding the filing of its declaratory judgment action and during the pendency of the action:

(1) It has not used any "test or device", as that phrase is defined in Section 4(c) of the Voting Rights Act, "for the purpose or with the effect of denying or abridging the right to vote on account of race or color," or in contravention of the guarantees given by the Act to members of language minority groups;[53]

(2) "no final judgment of any court of the United States . . . has determined that denials or abridgements of the right to vote on account of race or color," or in violation of the guarantees to members of language minority groups have occurred within the territory of the state or political subdivision;[54]

(3) "no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice" challenged on the grounds described in prerequisite (2) above;[55]

(4) there is no pending action alleging any such denial or abridgement of the right to vote (no declaratory judgment may issue so long as an action is pending, even if the action is filed subsequent to the filing of the declaratory judgment action);[56]

(5) no Federal examiners have been assigned to the state or political subdivision under the Voting Rights Act;[57]

(6) the State or political subdivision and all governmental units within it have complied with the preclearance requirements of Section 5 of the Voting Rights Act;[58]

(7) "the Attorney General has not interposed any objection," not overturned by a final judgment of a court, and no declaratory judgment under Section 5 has been denied with respect to any submission of the state or political subdivision under Section 5, and "no such submissions or declaratory judgment actions are pending";[59]

(8) the state or political subdivision and all governmental units within it

> (i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;
>
> (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this Act; and
>
> (iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.[60]

(9) In addition to the above requirements, H.R. 3112 would bar bail out if the state or political subdivision and governmental units within its territory have, during the ten-year period before judgment is entered, "engaged in viola-

tions of any provisions of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color" or in contravention of the guarantees to language minority groups, unless the state or political subdivision "establishes that any such violations were trivial, were promptly corrected, and were not repeated."[61]

We are in substantial agreement with the approach to bail-out taken by H.R. 3112, an approach based upon the central role section 5 has played in achieving the ends of the Voting Rights Act, the desire to assure that only jurisdictions which have truly abandoned discriminatory voting practices are permitted to bail-out, and the belief that a meaningful opportunity for bail-out based upon the applicant having eradicated proscribed discrimination in voting will give encouragement for compliance to those jurisdictions to which the section 5 pre-clearance procedures are offensive. However, as noted above, whereas the Committee on Civil Rights believes that the H.R. 3112 bail-out provisions strike a proper balance in achieving these objectives, the Committee on Federal Legislation believes that certain of the prerequisites to bail-out in H.R. 3112 can be relaxed slightly to make bail-out more achievable without incurring any significantly greater risk that undeserving jurisdictions will be released from the prophylactic requirements of Section 5.

Specifically, both Committees strongly believe that the prerequisites for bail-out specified in items numbered 1, 2, 5, 7, 8 and 9 above are fair, wholly consistent with the purposes of the Voting Rights Act and necessary for the Act's meaningful operation. However, a majority of the members of the Committee on Federal Legislation believe that modification or elimination in whole or in part is warranted for prerequisites 3, 4 and 6, whereas the Committee on Civil Rights fully endorses each of these items as entirely appropriate preconditions for bail-out.

The Committee on Federal Legislation is unanimous that H.R. 3112's provision whereby a declaratory judgment permitting bail-out would be barred by the mere pendency of an action alleging violations of the rights protected by the Voting Rights Act (prerequisite 4) should be modified so as to exclude, as a bar to bail-out, an action filed subsequent to the filing of an action for a declaratory judgment. A majority of the Committee on Federal Legislation also believe that even the pendency of an earlier-commenced action alleging violations should not bar bail-out. As to subsequently filed actions, the Committee on Federal Legislation concluded that permitting them to preclude bail-out would make it all too easy for potential litigants, no matter how frivolous their claims, and by the use of all too often successful delaying tactics, to impede and postpone bail-out. As to actions pending prior to filing an application to bail-out, the Committee on Federal Legislation concluded that a requirement that there be no pending actions alleging voting discrimination is unnecessary to prevent an undeserving state or political subdivision from escaping the prior clearance requirements of Section 5 because violations of voting rights which might be the subject of such an action would be a bar to bail-out under other prerequisites of the bail-out provision of H.R. 3112 [62]

The Committee on Civil Rights noted these considerations and concluded, nevertheless, that a political subdivision should be barred from bailing out of its Section 5 obligations if a lawsuit alleging violations of voting rights is pending at any time prior to the entry of a declaratory judgment in the bail-out proceeding. In its view, bail-out should plainly not be permitted until an action charging violations of voting rights is resolved. If the charges are valid, bail-out should not be permitted; and if the jurisdiction seeking bail-out believes the charges to be frivolous, it can move to dismiss and suffer no more than the inconvenience of some delay if it is correct.

A majority of both Committees believe that a state or political subdivision entering into a consent decree or settlement agreement resulting in the abandonment of a voting practice challenged as denying or abridging the right to vote (prerequisite 3) should preclude the entry of a declaratory judgment if the consent decree or settlement agreement was entered into prior to the effective date of the 1982 amendments. In such circumstances, we are satisfied that the consent decree or settlement agreement can fairly be treated as a final judgment or admission that the practice at issue was unlawful, and there are no competing considerations militating for a different result.

However, the Committee on Federal Legislation believes that the same rule should not apply to future consent decrees or settlement agreements in voting rights legislation. It believes that such a rule would discourage settlements in future cases and thereby both postpone the vindication of voting rights sought to be protected in litigation and extend the burden and cost of the litigation.[63]

The Committee on Civil Rights believes that making future consent decrees or settlement agreements in voting rights cases a bar to relieving jurisdictions from the continued obligation to adhere to Section 5 preclearance requirements will not discourage consent decrees and settlements. Moreover, that Committee believes that a consent decree and settlement agreement sufficiently imputes discriminatory electoral practices to a jurisdiction that it should not be permitted to bail-out from the prophylactic requirements of Section 5 and that whatever the benefit of encouraging settlements of litigation, it is outweighed by the competing interest of impeding such practices by requiring continued adherence to Section 5.

We gave much consideration to the requirement that the state or political subdivision applying for bail-out, and all governmental units within it, prove strict compliance with the preclearance requirements of Section 5 (prerequisite 6). The members of the Committee on Federal Legislation unanimously believe that an insubstantial delay in filing, occasioned by negligence, should not bar bail-out, but only if the procedure for which filing was necessary had no effect on the rights protected by the Voting Rights Act. A closely divided majority of the Committee on Federal Legislation also believes that bail-out should be permitted even if the procedure as to which there was a negligent insubstantial delay late filing under Section 5 also had an insubstantial effect on rights protected by the Act. A clear majority of the Committee on Federal Legislation strongly believes that a failure to file, in view of the fact that the procedure in question could have resulted in an objection by the Attorney General had there been compliance, constitutes adequate reason to bar bail-out. Both Committees believe that it is proper for the burden of proof on these issues to be on the state or political subdivision seeking the declaratory judgment.

A majority of the members of the Committe on Civil Rights strongly believe that any deviation from strict compliance with the preclearance requirements of Section 5, even if it may have resulted from human error or temporary oversight, should bar bail-out because the central role of Section 5 in protecting voting rights requires every incentive to be given for attention to its requirements and because many covered jurisdictions have failed to submit filings and have resisted efforts to require them to comply.[64]

H.R. 3112 provides that bail-out should be denied where a state or subdivision has itself met the tests, if there is any governmental unit within the territory of the state or subdivision that does not meet those tests.[65] A governmental unit within the statute is any jurisdiction required to make a Section 5 submission.[66] Since the offending governmental unit would remain subject to the preclearance requirements, it can be argued that the larger entity of which it is a part should be able to bail out if it has kept a clean slate for ten years. A majority of our Committees believes this consideration to be of lesser moment than the consideration of making each state and political subdivision concerned with availing itself of the Section 4(a) bail-out provision feel a special responsibility to assure full compliance by governmental units within it. Therefore, we support the H.R. 3112 approach which bars bail-out to a state or political subdivision on account of noncompliance by a governmental unit within it.

Once a jurisdiction has successfully bailed out, that should not end the matter. We endorse the provision in H.R. 3112 to further amend Section 4(a) so that, after the declaratory judgment issues, the District Court for the District of Columbia should retain jurisdiction of the matter for a period of ten years, and should vacate its judgment on motion of the Attorney General or an aggrieved person if, during that period, an event occurs which would have precluded the issuance of the declaratory judgment if it had happened prior to judgment.

The problem of bail-out is a complicated one, and the possible ways of dealing with it are almost endless. We are unanimous, however, in our view that a meaningful bail-out provision should be included in any legislation extending the preclearance provisions of the Voting Rights Act. The years since 1965 have seen a vast improvement in the conditions which originally brought the Voting Rights Act into being. The enactment of a bail-out provision will reflect the hope and expectation that conditions will continue to improve, and that, in many if not all covered jursidictions, the special protection afforded by the preclearance requirements will not always be necessary. We endorse the bail-out provision of H.R. 3112. The Committee on Civil Rights believes that H.R. 3112 as drafted strikes the proper balance between the need to protect voting rights and the desire to provide an incentive to jurisdictions to preserve a clean slate on voting procedures. The Committee on Federal Legislation believes that the provisions with respect to strict compliance with the preclearance filing requirements, pending lawsuits, and future consent decrees and settlement agreements be modified as described above. However, notwithstanding this disagreement, a clear majority of the members of the Federal Legislation Committee urges that the provisions of H.R. 3112 be enacted into law even if suggested changes in the bail-out provisions are not adopted.

SECTION 2 LITIGATION STANDARDS

Section 2 is nationwide in coverage and currently provides:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied [illegible] any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color [or on the basis of membership in a language minority.]67/

Whereas other provisions of the Voting Rights Act are directed at impeding only those discriminatory procedures adopted since 1964, Section 2 may be used to attack not only recently adopted discriminatory voting procedures but also those adopted long ago.68/ Moreover, although apparently unsettled in the case law, the Section 2 prohibition against discrimination in voting holds out the promise of enforcement through private litigation brought by aggrieved citizens69/ and the report accompanying H.R. 3112 states that it is intended to be available for that. 70/

Most other sections of the Voting Rights Act contain language rendering conduct prohibited or triggering action with respect to conduct which is "for the purpose or with the effect of denying or abridging the right to vote."[71] Section 2 is silent as to whether the practices or procedures which it proscribes are only those which can be shown to have been adopted with the explicit purpose of discriminating in voting on account of race or color or include those which in their application have the effect of discriminating in voting on account of race or color. Regrettably, there is no substantial legislative history on the point, although there is some testimony in the record which supports the view that Section 2 sought to bar voting practices which had either the purpose or the effect of discriminating in voting on account of race or color.[72]

The issue of whether relief from a voting procedure challenged under Section 2 could be secured only upon direct proof of express intent to discriminate or whether it could also be obtained upon the lesser proof of a discriminatory effect has been rarely addressed. Some lower courts which considered the issue in recent years indicated that Section 2 would permit a successful challenge to a voting procedure upon proof of a discriminatory effect even if no explicit discriminatory purpose is proved.[73] However, most challenges to allegedly discriminatory procedures seem to have been brought under the Fourteenth and Fifteenth Amendments.[74] In White v. Regester,[75] a case in which the Supreme Court decided the constitutionality under the Fourteenth Amendment of an at-large election system claimed to be discriminating against Mexican Americans and blacks, the Court held that practices which were discriminatory in view of the "totality of the circumstances" would be held constitutionally invalid.[76]

However, seven years after White v. Regester, in Mobile v. Bolden, a four Justice plurality of the Court, in an opinion which purported to be consistent with Regester, effectively construed Section 2 as requiring direct proof of a discriminatory intent in order to establish a violation of that Section.[77] Mobile v. Bolden was a case brought under Section 2 and the Fourteenth and Fifteenth Amendments to invalidate a Mobile, Alabama at-large election scheme for city commission elections which had been adopted in 1911 and under which no black council member had ever been elected despite the existence of a large black population in Mobile.[78] It is specifically to overrule the four Justice plurality in Mobile v. Bolden, as well as to bring Section 2 into line with the other provisions of the Voting Rights Act, that H.R. 3112 would amend Section 2. As amended, Section 2 would prohibit any qualification, prerequisite, standard, practice or procedure even without direct evidence that it was imposed or applied "to deny or abridge" the right to vote "on account of race or color" or in contravention of the Act's guarantees to language minority groups if the proof shows that it was imposed or applied "in a manner which results in a denial or abridgment" of the right to vote "on account of race or color" or in contravention of the Act's guarantees to language minority groups.[79]

Our Committees endorse H.R. 3112's amendment of Section 2 to eliminate the requirement of proof of discriminatory purpose and to permit a plaintiff successfully to challenge a voting practice or procedure if he proves that it is applied "in a manner which results in a denial or abridgment" of rights protected by the Voting Rights Act. This new "effects" test should not be applied in a mechanical manner to require proportional representation for protected minorities but rather should be applied to allow the fact of numerical dilution of minority votes to be considered as just one of the totality of circumstances in determining the ultimate question of whether meaningful participation in the electoral process has been denied on account of race, color or membership in a language minority group. The legislative history of H.R. 3112 expresses this interpretation of the new language in unmistakable terms, specifically stating that the new language "does not create a right of proportional representation" where members of a minority group "have not been elected in numbers equal to the group's proportion of the population" but that this fact, "along with other objective factors, would be highly relevant".[80] Additionally, H.R. 3112 in Section 2 itself makes it plain that Section 2 may not be used to require proportional representation or to bar at large election procedures or systems solely because proportionate numbers of minority representatives are not elected:

> The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

While such numerical factors may be relevant to the ultimate question and should be given some consideration, it is our view, and the view that courts will undoubtedly follow because it is expressed in the legislative history and in the statute, that it is inappropriate for numerical factors to be accorded dispositive weight.

In supporting H.R. 3112's proposed effects test for Section 2, we recognize that proof of purposeful discrimination does not require a showing that a discriminatory purpose was the sole or dominant purpose for the challenged voting practice or procedure.[81] However, we have also considered that it is extremely difficult to prove any discriminatory motive.[82] The Supreme Court a decade ago in Palmer v. Thompson, stated that:

> It is difficult or impossible for any court to determine the 'sole or dominant' motivation behind the choices of a group of legislators. Futhermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason . . . it would presumably be valid as soon as the legislature

> or relevant governing body repassed it for different reasons.83/

Indeed, the record in Mobile, where no black had ever been elected under the challenged at-large multimember system which had been adopted in 1911,84/ indicates the difficulty of establishing purposeful discrimination.

Moreover, as Justice White commented in his dissenting opinion, the Court's resort to excessively strict standards of proof "leaves the courts below adrift on uncharted seas with respect to how to proceed."85/ In any event the absence of a majority opinion in Mobile and the difficulty post-Mobile courts have had in reconciling the Court's multiple opinions86/ in the case is another good reason to adopt the Section 2 standard of H.R. 3112.

Prior to Mobile, the Court in White v. Regester, supra, had invalidated a multimember system there challenged under the Fourteenth Amendment because of an aggregate of factors emerging from "a totality of the circumstances."87/ As the Court explained this Fourteenth Amendment standard,

> [I]t is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question -- that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.88/

Under this standard, the Court examined the history of discrimination which had affected the right to vote; the existence of electoral mechanisms, such as a majority vote requirement for party nomination and a place rule, which enhanced the opportunity for racial discrimination at the polls; the very limited number of minority persons elected to the Texas Legislature since Reconstruction days; allegedly discriminatory slating; the use of "'racial campaign tactics'" to defeat candidates with overwhelming minority support;

disadvantaged socio-economic conditions in the minority community which inhibited political participation, and cultural and language barriers that made political participation extremely difficult.[89]

As noted above, the Commitee Report accompanying H.R. 3112 suggests that the language proposed for Section 2 is intended to require that voting procedures challenged under Section 2 as unlawfully discriminatory be tested by means of a broad inquiry into objective factors of the kind considered by the Court in White v. Regester.[90] We approve this approach. We believe that the adoption of an effects test for Section 2 will serve the salutary purpose of advancing the effort to "banish the blight of racial discrimination in voting"[91] without locking courts either into unacceptable rules requiring proportional or minimum representation for minorities or into the undesirable and unfair posture of having to make mechanical applications of frozen formulae.

SECTION 203 BILINGUAL REQUIREMENTS

Section 203 was added to the Voting Rights Act in 1975 and is due to expire on August 6, 1985.[92] It was designed to eliminate language barriers in voting with regard to certain language minority citizens -- defined as persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.[93] Section 203 applies to states and political subdivisions (1) in which more than 5% of the citizens of voting age are members of a single language minority, and (2) where the illiteracy rate of such persons as a group is higher than the national illiteracy rate (with illiteracy defined as failure to complete the fifth primary grade).[94] Section 203 requires these states and political subdivisions which now provide ballots and other election materials only in English also to provide them in the language of the applicable language minority group.[95] Thus, Section 203 basically bars the use of linguistic literacy tests and devices for language minority citizens in a manner similar to Section 201's prohibition of the use of literacy test and discriminatory devices for black citizens. One difference, however, is that Section 203 is only a temporary provision, whereas Section 201, barring literacy tests in English, is a permanent provision of the Act.[96/]

Section 203 protects both natural born and naturalized minority citizens, but the disenfranchisement of non-English speaking natural born citizens sought to be remedied by Section 203 is especially harsh. Many of the people benefitted by § 203 were never educated in English even though they were educated in the United States, e.g., Native Americans educated in their native languages, and Puerto Rican citizens educated in Puerto Rico. Section 203 is directed at a past and current fact of American life: the fact that many of our native adult citizens are not fluent in English. As Congress stated in Section 4(f) of the Act, many language "minority citizens are from environments in which the dominant language is other than English," many "have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language;" accordingly, "voting discrimination against citizens of language minorities is pervasive."[97/]

Recent studies indicate that the bilingual provisions added in 1975 have had a significant impact on efforts to increase voter participation among Hispanics. One study reports that there has been a 29.5 percent increase in the number of Hispanics registering to vote nationwide. In the Southwest, the reported increase is 44 percent.[98/]

H.R. 3112 proposes to extend the Section 203 bilingual requirements for an additional seven years from August 6, 1985 to August 6, 1992.[99/] We endorse this provision because it appears that the Section 203 bilingual requirements will be needed beyond 1985 and providing the extension in conjunction with the other amendments under consideration is more efficient than accomplishing the same end by separate legislation just two years from now.

In favoring the extension of Section 203, we are making no comment or judgment whatsoever on issues of bilingualism in the work place or in education. The problem addressed by Section 203 and the only problem we address here is the need to provide continued protection against the effective denial of the right to vote to adult United States citizens who are not fluent in English, and who may not have ever been educated in English.100/ Since these persons are citizens under our Constitution, and entitled to participate in the electoral process, it seems clear to us that bilingual elections are the way to give meaning to their right of free exercise of the franchise in a democracy. A citizen's right to vote simply should not be conditioned on what amounts to a literacy test or device.

We recognize that the provision of bilingual election materials does add to the monetary cost of holding an election. However, elections are expensive, even without the requirement of bilingual materials. The additional cost for bilingual materials is marginal when compared with the total cost of holding an election. For example, in Los Angeles County (where Hispanics comprise 30% of the population) the total cost for the 1980 general election was $7 million; but only $135,000, or less than 1.9% of that total expenditure, was spent on implementing bilingual elections.101/ In New York, where bilingual elections also are held, the bilingual expenditure also has been viewed as "minimal."102/ Even if the cost of a bilingual election were a more substantial part of the total cost, we would endorse the expenditure of the funds to assure language minority groups, as defined by the Act, the opportunity to exercise the fundamental Constitutional right to vote.

CONCLUSION

The Voting Rights Act has proven to be effective in dealing with the problem of discrimination in voting. To curtail the Act now would cast serious doubt on the nation's continuing commitment to the free exercise of the franchise by all citizens. We believe that it would be unwise, unfair and most unfortunate to impair the effectiveness of the Act. We therefore strongly endorse making the Section 5 preclearance requirement permanent together with an appropriate liberalization of the Section 4(a) bail-out provision. We also recommend the change in the Section 2 litigation standards and extension of the Section 203 bilingual requirements.

Respectfully submitted,

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* Messrs. Barist and Smith and Ms. Schubin dissent from certain parts of this Report, as outlined in their separate statements, which follow.

Separate Statement of Jeffrey A. Barist and Robert S. Smith

We think the Voting Rights Act should continue to stand as a barrier against any attempt to exclude citizens from the political process because of their race. It should not, however, be converted into a device for maximizing the political power of racial and linguistic minorities. We therefore dissent from the Committee's approval of the portion of H.R. 3112 which would substitute an "effects" for a "purpose" test in identifying voting practices and procedures which are forbidden by Section 2 of the Voting Rights Act.

The meaning of an "effects" test is, at best, unclear. The very idea of a voting practice or procedure which is discriminatory in "effect" (or, to use the language of H.R. 3112, in "result"), though innocent in "purpose," seems to us to be a contradiction in terms. Inherent in the very notion of discrimination is some purposeful conduct by the person doing the discriminating. Or, again to use the language of the statute, how can it be said that a particular practice denies the right to vote "on account of" race, unless there was some racial motivation for the practice?

If the idea of a voting practice which is discriminatory in "effect" but not in "purpose" can be given any meaning, it would seem to include every practice whose impact on a racial or language minority is in any way adverse. This would include any drawing of district lines which did not maximize minority political power; any practice of at-large elections in a community with a substantial minority population; any runoff or majority-win requirement in such a community; any location of a polling place which inconveniences a larger proportion of the minority than the white population -- all would be forbidden regardless of how innocent the intention behind them. We do not think that most advocates of the "effects" test really favor such extreme results, but we do not know how they can rationally be avoided if the "purpose" of voting practices is really to be disregarded.

An "effects" test is already imposed in Section 5, the "pre-clearance" section of the Voting Rights Act. The House Committee Report on H.R. 3112 implies that if H.R. 3112 is enacted, Section 2 will be brought into line with Section 5. We think this attempt at uniformity is misguided. Section 5 -- properly in our view -- imposes stringent limits on attempts by covered jurisdictions to institute changes in voting practices and procedures. But the impact of Section 5 is far more limited than would be the impact of the proposed amended Section 2. Section 5 applies only to jurisdictions subject to the pre-clearance requirements -- *i.e.*, jurisdictions where there is some *prima facie* reason to suspect discrimination in voting; and it applies only to *changes* in the voting practices and procedures that existed when the Voting Rights Act was passed. Section 2, by contrast, applies to every "voting qualification or prerequisite to voting, or standard, practice or procedure" imposed or applied by any state or political subdivision in the United States.

The implications of extending the Section 5 "effects" test to Section 2 cases are disturbing. Jurisdictions covered by Section 5 have been prohibited from adopting majority-win requirements, staggered terms for legislative office, "numbered posts" (*i.e.*, the practice of requiring individual contests for each of several similar positions, such as members of a board of education) and at-large elections. *City of Rome* v. *United States*, 446 U.S. 156 (1980); *City of Petersburg* v. *United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973). It also seems clear that, under Section 5, no covered jurisdiction may adopt a legislative reapportionment plan which has the effect of decreasing the extent to which minorities are represented in the legislature. Beer v. United States, 425 U.S. 130, 140-41 (1976).

All these changes have been held bad under Section 5 even on the assumption that their purpose was benign. Presumably, then, under the proposed amended Section 2, all majority-win requirements, staggered terms and at-large elections are suspect, as is any legislative apportionment which does not maximize minority representation. It is unlikely, for example, that the New York City requirement for a runoff primary for city-wide office where no candidate receives 40% of the vote the first time around could survive scrutiny under an "effects" test; it seems that the chances of electing a black to one of the three city-wide offices would be greatly enhanced if a primary election could be won with 25 or 30% of the votes.

The proposed change in Section 2 is, as the House Committee Report acknowledges, aimed directly at the Supreme Court's decision in City of Mobile v. Bolden, 446 U.S. 55 (1980). This, too, increases our concern about what the effect of the amendment would be. City of Mobile concerned a long-standing practice in which the executive and legislative power of a city government was vested in three commissioners, who were elected at large. The Justices of the Supreme Court disagreed as to whether this practice had been adopted or maintained for a discriminatory purpose, but the proposed amendment to Section 2 does not address that issue. Rather, the proposed amendment to Section 2 would provide that the purpose of a practice such as that at issue in City of Mobile is irrelevant -- that the plan would be condemned if its effect on minority political power was adverse.

Under the proposed amendment to Section 2, the Mobile three-commissioner system would presumably be held invalid without regard for its purpose. But what then of New York City's long-standing practice of electing its three senior executive officials at large and giving them substantial legislative power (through their votes on the Board of Estimate)? Although New York City has a substantial black minority, there has never so far as we know been a black Mayor, City Council President or comptroller. Is not then the effect of New York City's practice very similar to the one at issue in Mobile? And what of the practice, common in New England communities, of vesting governmental power in the hands of three selectmen chosen at large?

In short, both logic and legislative history suggest that the impact of the "effects" test would be dramatic: at least in jurisdictions where substantial minority populations exist and where racial bloc voting is common (as it usually is when a minority and non-minority candidate oppose each other), every electoral system would have to be overhauled to assure, insofar as possible, that minority citizens are represented in a proportion equal to or greater than their share of the population.* We do not think that such a massive overhaul of our electoral processes is necessary or desirable, particularly in that majority of jurisdictions where minorities have not, historically, been denied the right to vote. Such practices as at-large elections may have legitimate purposes: they should not be tested solely by their impact on racial or linguistic minorities.

As we have said, we doubt that most of the advocates of an "effects" test really want to achieve the results that we think such a test, rationally applied, would lead to. Indeed, the majority report assumes -- contrary to our reading of

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* We are not reassured by the proposal to state, in amended Section 2, that the mere failure to elect a proportional number of minority officials shall not "in and of itself" constitute a violation of the section. Rather we are disturbed that the only limitation on the statute would be to exclude this very extreme result. The proposed amendment does not exclude, for example, the possibility that failure to create a proportional number of districts with black majorities might "in and of itself" be illegal.

H.R. 3112 and its legislative history -- that the proposed amendment to Section 2 will be interpreted as requiring not a strict "effects" rest but only a more stringent version of the "purpose" test. It is thus apparent that the majority embraces the proposed amendment not because it really thinks the "purpose" of a practice should be irrelevant but because it thinks courts will be unable or unwilling to identify the true purpose of discriminatory activity.

We think the majority's mistrust of the courts is unjustified. Courts have never been, and need not be, obliged to accept at face value the self-serving statement of a state or political subdivision as to the purpose of its voting practices. Discriminatory purposes can be discerned from, among other things, the history of race relations in the community; the events which immediately preceded the adoption of a practice at issue; and the effect of the practice -- for rejection of the "effects" test should not undermine the obvious and familiar principle that the effect of particular conduct may be an important clue to its purpose. Discriminatory purpose, like any other fact, may be proved by circumstantial evidence.

The "effects" test, then, seems to us to be unjustifiable and unnecessary. It would, as we have mentioned, create the risk of serious interference with the normal and well-established functioning of governmental processes. But we have a more fundamental objection. It is that the "effects" test tends to undermine what we think is the ultimate goal of all civil rights legislation -- the attainment of a society in which people are treated as equals, regardless of their skin color or ethnic background. The "effects" test in substance requires communities having no wish to discriminate and no history of discrimination to bend over backwards in an effort to maximize the political power of racial and linguistic minorities. It is thus a step in the direction towards which other governmental policies of recent years have alsc tended -- towards making racial and linguistic minorities wards of the government, given a special status in society as a recompense for socio-economic deprivations. While we sympathize with the impulse behind this tendency, we believe the tendency is mistaken. In the long run, it will erode our country's egalitarian principles and will deepen the antagonism between members of different ethnic and social groups. We think the "effects" test is one of many misguided attempts to remedy past evils, one that will in fact generate more evil than it cures.

SEPARATE STATEMENT OF MYRA SCHUBIN

I dissent from that part of the majority report which endorses H.R. 3112's amendment of §2 of the Voting Rights Act. I agree that an interpretation of §2 which permits only direct proof of subjective intent to discriminate would be unduly restrictive. However, that is not the test expressed by the plurality opinion in Mobile v. Bolden which recognized that "Of course, the impact of the official action - whether it bears more heavily on one race than another... - may provide an important starting point.... But where the character of a law is readily explicable on grounds apart from race...disproportionate impact alone cannot be decisive and courts must look to other evidence." 446 U.S. 55, 60. The plurality opinion in Mobile doubtless placed undue weight on the subjective motivation of the State legislators in enacting the Commission form of government in 1911. I am concerned, however, that the language proposed to correct this misinterpretation will be deemed an "effects" test under which racially neutral voting procedures will be invalidated substantially on the basis of evidence that fewer members of a racial minority had been elected than might have been under some other procedure.

The language added to assure that the new §2 will not require strict proportional representation of minority groups is not reassuring. On the contrary, its exceedingly narrow scope together with the statement in the legislative history to the effect that where members of a minority group have not been elected in numbers equal to the group's proportion of the population, this fact would be "highly relevant" to the issue of whether there has been a denial of voting rights, leads me to conclude that the amendment will be deemed to give this kind of numerical test predominant weight.

FOOTNOTES

1/ Pub. L. No. 89-110, 79 Stat. 437 (current version at 42 U.S.C. §§ 1973 et seq.) (1974 and Supp. 1974-80).

2/ The bill was passed in the House 328-74 and in the Senate 79-18. South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

3/ Id. at 308.

4/ Congressional Quarterly Weekly Report, Vol. 39., No. 15, at 633 (April 11, 1981); Letter of Theodore M. Hesburgh, Chairman, United States Commission on Civil Rights, 115 Cong. Rec., 38124 (December 10, 1969) H12064; CPR Journal, December 20, 1969, p. 374.

5/ Congressional Quarterly Weekly Report, Vol. 39., No. 15, at 635 (April 11, 1981).

6/ This Association, in joint report by the Committee on Federal Legislation and the Committee on the Bill of Rights, urged passage of the Voting Rights Act in 1965. See 20 Record of N.Y.C.B.A. 310 (1965). Subsequently, the Association, through a report by the Committee on Federal Legislation, supported the extension and broadening of the Act in 1970. See 25 Record of N.Y.C.B.A. 250 (1970).

7/ Evans v. Corman, 398 U.S. 419, 426 (1970)

8/ Voting Rights Act of 1965 §§ 4, 5, Public Law 89-110, 79 Stat. 438 (current version at 42 U.S.C. §§ 1973b, 1973C (1974 & Supp. 1974-80)).

9/ Pub. L. No. 89-110 § 4a, 79 Stat. 438 (current version at 42 U.S.C. § 1973b(a)).

10/ Pub. L. No. 91-285, 84 Stat. 314 (1970).

11/ Id. at § 3.

12/ Id. at § 4.

13/ Id. at § 6.

14/ Pub. L. No. 94-73, § 101, 89 Stat. 400 (1975) (codified in 42 U.S.C. § 1973b(a) (Supp. 1974-80).

15/ Pub. L. No. 94-73, 89 Stat. 401 (1975) (codified at 42 U.S.C. § 1973b(f)) (Supp. 1974-80). The language minorities provision applies to states and to political subdivisions (1) where more than 5% of the citizens of voting age comprise a single language minority, (2) where only English materials were used in the 1972 election (defined in the 1975 amendment as a "test or device"), and (3) where less than 50% of the eligible voters were either registered on November 1, 1972 or voted in the 1972 presidential election. 42 U.S.C. § 1973b(f). Language minority, as defined in § 203(e) of the Act, refers to citizens who are American Indian, Asian American, Alaskan Native, or of Spanish heritage. 42 U.S.C. § 1973aa-1a(e).

16/ The Voting Rights Act, as amended, is set forth in 42 U.S.C.A. §§1973, *et seq*. (1974 and Supp. 1974-80).

17/ U.S. Commission on Civil Rights, The Voting Rights Act: Unfulfilled Goals (September 1981).

18/ *Id*. at 251.

19/ *Id*.

20/ *South Carolina* v. *Katzenbach*, *supra* at 308.

1976 census figures show that 75.4% of the eligible whites but only 58.1% of the blacks were registered to vote in Alabama and 73.2% of the whites but only 56.3% of the blacks were registered in Georgia. U.S. Dept. of Commerce, Bureau of the Census, *Registration and Voting in November, 1976 -- Jurisdictions Covered by the Voting Rights Act Amendments of 1975*, Series P-23, No. 74, 1978, Table 2.

In terms of elected officials, statistics compiled in 1980 (based on 1970 population figures) were even more compelling: in Alabama, which is 24.5% black, blacks represent only 5.7% of all elected officals; in Georgia, which is 26.2% black, blacks represent only 3.7% of all elected officals. Joint Center for Political Studies, *National Roster of Black Elected Officials*, Vol. 10, 1981.

Numerous detailed accounts of discrimination in registration and voting are reported in U.S. Commission on Civil Rights, The Voting Rights Act: Unfulfilled Goals, Ch. 3 & 4 (September 1981).

As the Fifth Circuit observed on March 20, 1981, in striking down the use of at-large elections for the County Commission in the circumstances in which they were used in Burke County, Georgia: "The vestiges of racism encompass the totality of life in Burke County." *Lodge* v. *Buxton*, 639 F.2d 1358, 1381 (5th Cir. 1981).

21/ *New York Times*, July 31, 1981, at A22, col. 2 (editorial).

22/ *New York Times*, Oct. 7, 1981, at B10, col. 1.

23/ Lawyers' Committee For Civil Rights Under Law, Hard Questions and Answers About the Voting Rights Act at 5; *Congressional Quarterly Weekly Report*, Vol. 39, No. 51, at 2526 (Dec. 19, 1981).

24/ *New York Times*, November 8, 1981, at A22, col. 1.

25/ *Id*.

26/ Report by the Committee on Federal Legislation, 25 Record of N.Y.C.B.A. at 251 (1970).

27/ On August 11, 1981, the ABA House of Delegates formally endorsed H.R. 3112 on a recorded vote of 233 to 35. See *New York Times*, at A16 (August 12, 1981).

28/ The members of this Association are well aware of the impact of this provision as a result of the injunction by a federal three-judge court of portions of the most recent primary and general elections in the City of New York. *Herron* v. *Koch*, 523 F. Supp. 167 (S.D.N.Y. 1981).

29/ See note 39 *infra* and accompanying text.

30/ H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 11 (1981). Lawyers' Committee for Civil Rights under Law, *Fact Sheet on Section Five Preclearance*, at 1 (1981). In Mississippi, where the entire state has been subject to Section 5 since 1965, there were as many Section 5 objections entered by the Attorney General since 1975 as there were in the previous ten years. *Id*. See also Lawyers Committee for Civil Rights Under Law, *Voting in Mississippi:, A Right Still Denied*, at 2 (1981).

31/ 42 U.S.C. § 1973b (b) & (f) (1974 & Supp. 1974-80).

32/ 42 U.S.C. § 1973b(b), Where the device at issue is the use of solely English notices, ballots or other voting and registration materials, covered states are further defined as those in which more than 5% of the citizens and members of a single language minority. 42 U.S.C. § 1973b(f)(3). See note 7 *supra*.

33/ 42 U.S.C. § 1973b(a). The Section 4(a) bail-out provision, which currently is quite limited, is discussed at pp. 13-14, *infra*.

34/ The jurisdictions now covered by Section 5, as set forth in 46 Fed. Reg. 879-80 (1981) (to be codified in 28 C.F.R. Part 51 (Appendix)):

Alabama (entire state);
Alaska (entire state);
Arizona (entire state);
California (4 counties: Kings, Merced, Monterrey, and Yuba);
Colorado (1 county: El Paso);
Connecticut (3 towns: Groton, Mansfield, and Southbury);
Florida (5 counties: Collier, Hardee, Hendry, Hillsborough, and Monroe);
Georgia (entire state);
Hawaii (1 county: Honolulu);

Idaho (1 county: Elmore);
Louisiana (entire state);
Massachusetts (9 towns: Amherst, Ayer, Belchertown, Bourne, Harvard, Sandwich, Shirley, Sunderland, and Wrentham);
Michigan (2 townships: Buena Vista, Clyde);
Mississippi (entire state);
New Hampshire (10 towns: Antrim, Benton, Boscawen, Millsfield Township, Newington, Pinkhams Grant, Rindge, Stewartstown, Stratford, and Unity);
New York (3 counties: Bronx, Kings, and New York);
North Carolina (40 counties: Anson, Beaufort, Bertie, Bladen, Camden, Caswell, Chowan, Cleveland, Craven, Cumberland, Edgecombe, Franklin, Gaston, Gates, Granville, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Jackson, Lee, Lenoir, Martin, Nash, Northampton, Onslow, Pasquotank, Perquimans, Person, Pitt, Robeson, Rockingham, Scotland, Union, Vance, Washington, Wayne, and Wilson);
South Carolina (entire state);
South Dakota (2 counties: Shannon and Todd);
Texas (entire state);
Virginia (entire state);
Wyoming (1 county: Campbell).

35/ 42 U.S.C. § 1973c (1974 & supp. 1974-80).

36/ Id.; Garcia v. Uvalde County, 455 F. Supp. 101 (W.D. Tex. 1978), aff'd, 439 U.S. 1059 (1979).

37/ 42 U.S.C. § 1973c.

38/ Id.

39/ South Carolina v. Katzenbach, 383 U.S. 301, 314 (1966) (summarizing need for the 1965 voting rights legislation). As the House and Senate Judiciary Committees concluded in 1975: "In recent years the importance of this provision has become widely recognized as a means of promoting and preserving minority political gains in covered jurisdictions." H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 8 (1975); S. Rep. No. 94-295, 94th Cong., 1st Sess., at 15 (1975). More to the point:

> The recent objections entered by the Attorney General . . . to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism. As registration and voting of minority citizens increases [sic], other measures may be resorted to which would dilute increasing minority voting strength.
>
> * * *
>
> The Committee is convinced that it is largely Section 5 which has contributed to the gains thus far achieved in minority political participation, and it is likewise Sect[i]on 5 which serves to insure that progress not be destroyed through new

> procedures and techniques. Now is not the time to remove those preclearance protections from such limited and fragile success.

H.R. Rep. No., 94-196, 94th Cong., 1st Sess. 10-11 (1975).

40/ *City of Rome, Georgia* v. *United States*, 446 U.S. 156, 174 (1980), quoting from *South Carolina* v. *Katzenbach*, 383 U.S. 301, 314 (1966).

41/ *See, e.g.*, *City of Rome, Georgia* v. *United States*, 446 U.S. 156, 161-62 (1980).

42/ One such example of the dilution of minority voting which occurs when jurisdictions switch from plurality-win to majority-win requirements is documented in *City of Rome, Georgia* v. *United States*, 446 U.S. 156, 183-84 & 184 n.20 (1980). The City of Rome in 1966, shortly after enactment of the Voting Rights Act, changed its plurality win requirement for City Commission and Board of Education elections to a majority-win requirement. Neither this change nor a host of other changes were submitted to the Justice Department for preclearance until 1976, a decade later. In the interim, the Reverend Clyde Hill ran for the Board of Education in 1970 under the majority-win requirement adopted in 1966. As summarized by the Supreme Court:

> The city's elections were operated under that scheme when Rev. Hill ran for the Board of Education in 1970. With strong support from the Negro community, Rev. Hill ran against three white opponents and received 921 votes in the general election, while his opponents received 909, 407, and 143 votes respectively. Rev. Hill, then, would have been elected under the pre-1966 plurality-win voting scheme. Under the majority-win/runoff election provisions adopted in 1966, however, a runoff election was held, and the white candidate who was the runner-up in the general election defeated Rev. Hill by a vote of 1409-1142.

Id. at 184 n. 20. Parenthetically, the Justice Department in 1976 objected under Section 5 to many of the city's voting changes including the majority-win change. The city thereafter sought judicial review of the Justice Department objections, and the Supreme Court in 1980 upheld the objections and also upheld (once again) the constitutionality of the Voting Rights Act in response to the city's challenge. [Cite]

43/ See note 30 *infra* and accompanying text.

44/ *See* 28 C.F.R. § 51.2(c) & 51.10 (1980) (defining and outlining contents of § 5 submissions); Statement of Robert Abrams before the House Subcommittee on Civil and Constitutional Rights, at 4-5 (June 10, 1981) (hereinafter cited as Statement of Robert Abrams).

45/ *Id.* ag 5. Overall, the Attorney General of New York (which has three counties -- New York, Kings and Bronx -- covered by Section 5) was of the view "that the preclearance requirement has not been overly burdensome to administer." *Id.* at 3 & 4. In fact, "[w]hen the voting change is not objectionable, the preclearance process imposes an insignificant burden on the state and results in no delay in implementing amendments to our voting laws." Id. at 4-5.

46/ Lawyers' Committee For Civil Rights Under Law, Hard Questions and Answers About the Voting Rights Act at 5 (hereinafter cited as Hard Questions).

47/ Id.; Statement of Robert Abrams, supra note 36, at 5 (preclearance "results in no delay in implementing amendments to our voting laws.")

48/ Hard Questions, supra note 46, at 4; H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 11 (1981).

49/ As stated by New York Attorney General Robert Abrams in reference to the Section 5 preclearance provision: "For the past fifteen yers, this requirement has deterred the use of new forms of discriminatory practices -- in many cases by discouraging even their introduction into state legislatures." Statement of Robert Abrams, supra note 36, (emphasis in original).

50/ See, e.g., New York Times, June 4, 1981, at B1 (one proposal suggested limiting preclearance requirement to those "changes that have elicited the most objections from the Justice Department").

51/ As the Supreme Court observed a decade ago, holding that changes in polling places can have a discriminatory effect and they are subject to Section 5: "Locations at distances remote from black communities or at places calculated to intimidate blacks from entering, or failure to publicize changes adequately might well have that effect." Perkins v. Matthews, 400 U.S. 379, 388 (1971).

Illustrative is a recent example from Mississippi: "[i]n the 1978 U.S. Senate race in which Charles Evers was a candidate, election officials in Hinds County, the state's most populous county, changed the location of 30 Jackson polling places in precincts in which two-thirds of the black registered voters resided, and failed to announce the moves until the day before the election." Lawyers' Committee for Civil Rights Under Law, Voting in Mississippi: A Right Still Denied, at 5-6 (1981).

Also illustrative of the manner in which even purportedly insignificant changes can have an adverse effect on minorities is the personnel policy adopted by Dougherty County, Georgia in the mid-1970's. The policy itself seemed rather benign: school system employees became required to take unpaid leaves of absence for the duration of any period in which they ran for elective office. The circumstances surrounding the adoption of the new policy shed more light on its adoption: the County had no prior experience with absenteeism among employees seeking office; the policy was adopted less than one month after a Board of Education employee, John White, became the first black in recent memory to run for the State General Assembly from Dougherty County. After losing several thousand dollars in salary as a result of the policy, John White sued to obtain a court decision that the policy was subject to the preclearance requirements of Section 5. Dougherty County, Georgia Bd. of Ed. v. White, 439 U.S. 32 (1978).

52/ 42 U.S.C. § 1973b(a)(Supp. 1974-80). Section 4(d) provides that this test for exclusion shall have been met if "(1) incidents of such use have been few in number and have been promptly and effectively corrected by state or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future." 42 U.S.C. § 1973b(d) (Supp. 1974-80).

53/ H.R. 3112, 97th Cong., 1st Sess. (1981), 127 Cong. Rec. 15695 (1981).

54/ Id.

55/ Id.

56/ Id.

57/ Id.

58/ Id.

59/ Id.

60/ Id.

61/ Id.

62/ In this regard, the Committee on Federal Legislation notes that any violation of voting rights protected by the Act which might be the subject to an action could bar an undeserving state or political subdivision from bail-out in any event under prerequisite 1 (if it was a "test or device"), under prerequisite 6 (if preclearance for it had not been sought), under prerequisite 7 (if the Attorney General objected to it when preclearance was sought) or under prerequisite 9 (if an objectant in the declaratory judgment proceeding demonstrates that the complained-of procedure was a violation of the Constitution or laws of the United States, including the Voting Rights Act).

63/ In concluding that future consent decrees and settlement agreements should not automatically preclude bail-out, the Committee on Federal Legislation notes again that a voting practice challenged in the settled litigation as denying or abridging the right to vote could nevertheless be a bar to bail-out under one or more of the other prerequisites in the amended Section 4(a) proposed in H.R. 3112; the Committee on Federal Legislation also notes that one of the terms of the consent decree or settlement agreement could itself be that bail-out under Section 4(a) would be unavailable.

64/ House Committee on the Judiciary, "Voting Rights Act Extension: Report together with Supplemental and Dissenting Views" H.R. Report No. 97-227 (Sept. 15, 1981) at p. 13.

65/ H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 40-41 (Sept. 15, 1981), accompanying H.R. 3112.

66/ Id. Under U.S. v. Board of Commissioners or Sheffield Co., Alabama, 435 U.S. 110 (1978), all political units within a designated state are subject to Section 5 preclearance requirements.

67/ 42 U.S.C. § 1973 (Supp. 1974-80).

68/ 42 U.S.C. § 1973 (Supp. 1974-80).

69/ In *Gray* v. *Main*, 291 F.Supp. 998 (M.D. Ala. 1966), the *District Court* concluded that a private litigant had standing to assert the substantive provisions of 42 U.S.C. § 1973 in which § 2 is codified. However, it should be noted that no § 2 claim was asserted in that case. Furthermore, in *Mobile* v. *Bolden*, 446 U.S. 55 (1980), the Supreme Court avoided reaching a decision as to whether a private right of action arose under §2, although it did point out that it had recognized a private right of action under § 5 in *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969).

70/ H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 74 (1981).

71/ *See, e.g.*, 42 U.S.C. §§ 1973a(b), 1973b(a), 1973(c). Cite sections in Voting Rights Act with "purpose or effect" test and discuss them in this footnote.

72/ The primary witness testifying on behalf of the Johnson administration in 1965, Attorney General Nicholas deB. Katzenbach, made it clear that Section 2 would reach discriminatory practices regardless of their purpose. He testified that Section 2 would reach "any kind of practice . . . if its purpose or effect was to deny or abridge the right to vote on account of race or color." *Voting Rights: Hearings on S. 1564 Before the Sen. Comm. the Judiciary*, 89th Cong., 1st Sess. 191-92 (1965). See discussion of legislative history in Brief for the United States Amicus Curiae, *Lodge* v. *Buxton*, 639 F.2d 1358 (5th Cir. 1981), at 40-41.

73/ *See, e.g.*, *Toney* v. *White*, 476 F.2d 203, 207-08 (5th Cir. 1973), *aff'd en banc*, 488 F.2d 310 (5th Cir. 1973); *Gremillion* v. *Renaudo*, 325 F.Supp. 375, 377 (E.D.La. 1971); *see also* *Nevett* v. *Sides*, 571 F.2d 209, 237-38 (5th Cir. 1978) (Wisdom, J., concurring).

74/ The relevant legislative history indicates that Section 2 was intended to incorporate the same standard as the Fifteenth Amendment. See *Mobile* v. *Bolden*, 446 U.S. 55, 60-61 (1980).

75/ 412 U.S. 755, 769 (1973)

76/ *Id.* at 769. Since *White*, this standard has been described in greater detail by lower courts. See discussion at *infra*.

77/ *Mobile* v. *Bolden*, 446 U.S. 55, 61, 65 (1980) (finding that § 2 of the Voting Rights Act added nothing to appellants' fifteenth Amendment claim and affirming a need to show discriminatory intent to establish a fifteenth Amendment violation).

78/ 446 U.S. 55 (1980)

79/ H.R. Rep. No. 97-227, 97th Cong. 1st Sess. 2, 28-32 (Sept. 15, 1981) Accompanying H.R. 3112

80/ *Id.* at 30

81/ *See* *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977) (requiring "proof that a discriminatory purpose has been a motivating factor in the decision").

82/ *See, e.g.*, *Personnel Administrator of Massachusetts* v. *Feeny*, 442 U.S. 256 (1979) (held that state veterans preference statute does not violate fourteenth Amendment).

83/ 403 U.S. 217, 225 (1971)

84/ 446 U.S. 55, 73 (1980)

85/ *Id*. at 103

86/ *Lodge* v. *Buxton*, 639 F.2d 1358 (5th Cir. 1981).

87/ 412 U.S. at 769

88/ *Id*. at 765-66

89/ *Id*. at 766-69

90/ *See* H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 30 (Sept. 15, 1981), accompanying H.R. 3112.

91/ *South Carolina* v. *Katzenbach*, 383 U.S. at 308.

92/ Pub. L. No. 94-73, 89 stat: 400, (current version at 42 U.S.C. § 1973aa-1a) (Supp. 1974-80).

93/ 42 U.S.C. § 1973aa-1a (e).

94/ 42 U.S.C. § 1973aa-1a(b) (Supp. 1974-80). Under Section 203(d), a jurisdiction may exempt itself from the bilingual requirements by obtaining a declaratory judgment holding that the illiteracy rate of the applicable minority group within the jurisdiction is actually "equal to or less than the national illiteracy rate." 42 U.S.C. § 1973aa-1a(d) (Supp. 1974-80). Several of the jurisdictions covered by Section 203 are also required under a more stringent formula set forth in Section 4(f) to provide bilingual election materials and further are subject to the Section 5 preclearance requirements. 42 U.S.C. § 1973b(f) (Supp. 1974-80). See discussion at 11 n. 17, *supra*. The jurisdictions currently covered by Section 203 number approximately 380 and are located in Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming. See 28 C.F.R. part 55, appendix (1980).

95/ 42 U.S.C. § 1973aa-1a(c) (Supp. 1974-80) (requiring only oral instructions where relevant language is oral or unwritten).

96/ Compare 42 U.S.C. § 1973aa-1a with 42 U.S.C. § 1973aa.

97/ 42 U.S.C. § 1973b(f).

98/ *Congressional Quarterly Weekly Report*, Vol. 39, No. 15, at 637 (April 11, 1981).

99/ H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 53 (1981).

100/ Section 203 does not have any effect on the requirement that, in order to become a naturalized United States citizen, a person must be able to read and write English. Nor can Section 203 be viewed as having any effect, one way or another, on the provision of bilingual instruction in the public schools.

101/ Mexican American Legal Defense and Educational Fund, Questions and Answers About Bilingual Elections, at 3 (1981) (figures supplied by Registrar of Voters for Los Angeles County). See H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 26 n.79 (reporting expenditures for language assistance made by several jurisdictions).

102/ Statement of Robert Abrams, supra note 36, at 14. In his statement, the New York Attorney General elaborated somewhat on this point:

> The Financial burden to the state of bilingual elections is minimal; beyond start-up costs, the sums are truly insignificant. For example, all translations of state-wide registration and voting materials is handled by the New York State Board of Elections. The translations are done by the Chairman of the Political Science Department of the State University at Albany, and cost, on average, just over $1,000 per year for the entire state. In Westchester County, with a Hispanic population of over 45,000 people, the costs of providing bilingual materials is approximately $3,000 per year, or less than .2% of the County Board of Elections' budget. By using volunteer interpreters provided by the Maryknoll priests and local Hispanic organizations, Westchester County spends no money on interpreters. And the return on these insignificant expenditures is enormous. It is estimated that since New York first provided bilingual elections, Hispanic registration has increased by 20 per cent. Since 1965, the number of New York Hispanic representatives in the state and federal legislatures has more than doubled. With minimal costs or burden, New York has done much to integrate the Hispanic community in New York into the electoral process.

Id.

PREPARED STATEMENT OF DR. AARON HENRY, PRESIDENT, MISSISSIPPI STATE CONFERENCE NAACP

SENATOR HATCH AND MEMBERS OF THE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, I APPRECIATE THE OPPORTUNITY TO SUBMIT MY TESTIMONY FOR THE RECORD OF THE HEARINGS ON EXTENSION AND AMENDMENT OF THE VOTING RIGHTS ACT.

MY NAME IS AARON E. HENRY. I AM THE PRESIDENT OF THE MISSISSIPPI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP). IT IS IN THIS CAPACITY THAT I OFFER MY STATEMENT OF THE EXPERIENCES OF BLACK AMERICANS IN MISSISSIPPI AS WE HAVE STRUGGLED TO OBTAIN AND PROTECT THE PRECIOUS RIGHT TO VOTE. I SUBMIT THAT THE STRUGGLE HAS BEEN AND CONTINUES TO BE ARDUOUS. IN MY CAPACITY AS PRESIDENT OF THE MISSISSIPPI STATE CONFERENCE OF THE NAACP, I URGE YOU TO SUPPORT S. 1992 WITHOUT AMENDMENT, TO EXTEND AND STRENGTHEN CERTAIN PROVISIONS OF THE VOTING RIGHTS ACT. S. 1992 IS FAIR AND EQUITABLE, AND WOULD SUBSTANTIALLY ADVANCE THE CAUSE OF PROTECTING THE MINORITY VOTE.

MISSISSIPPI PRIOR TO PASSAGE OF THE VOTING RIGHTS ACT

ALTHOUGH THE 15TH AMENDMENT TO THE CONSTITUTION WAS PASSED IN THE 1860'S AND BLACKS HAD A BRIEF PERIOD WHEN THEY WERE ABLE TO EXERCISE THE RIGHT TO VOTE, IT WAS NOT UNTIL 1965, AFTER THE PASSAGE OF THE VOTING RIGHTS ACT, THAT BLACK CITIZENS OF MY STATE WERE ABLE TO ENJOY THE RIGHTS OF CITIZENSHIP. THE ACT AND ITS ADMINISTRATIVE REMEDIES HAS RESULTED IN THE INCREASE OF SOME 320,000 CITIZENS REGISTERED TO VOTE - FROM 20,000 BEFORE THE PASSAGE OF THE ACT UNTIL NOW.

MISSISSIPPIANS HAVE PAID A DEAR PRICE FOR THE PRECIOUS RIGHT TO VOTE. IN 1956 REV. GEORGE W. LEE WAS MURDERED ON THE COURTHOUSE STEPS IN BELZONI, MISSISSIPPI, BECAUSE HE REFUSED TO TAKE HIS NAME OFF THE VOTING ROLLS. A FEW YEARS LATER, VERNON DAHMER OF HATTIESBURG, MISSISSIPPI, WAS THE VICTIM OF A WHITE MOB WHICH SATURATED HIS HOUSE WITH FLAMMABLE MATERIAL AND THEN IGNITED IT. ALTHOUGH TRAPPED LIKE

AN ANIMAL, DAHMER OPENED FIRE ON THE MURDERERS, MARKING THEIR CAR WHICH LED TO THEIR APPREHENSION AND SENTENCING FOR THE DENIAL OF HIS CIVIL RIGHTS. VERNON DAHMER'S CRIME WAS VOTER REGISTRATION ACTIVITIES--PAYING THE POLL TAXES FOR PEOPLE WHO WERE AFRAID TO GO TO THE COURTHOUSE TO PAY FOR THEMSELVES FOR FEAR OF ECONOMIC REPRISAL AND PHYSICAL HARM.

THOSE OF US IN THE NAACP CAN NEVER FORGET THE ASSASSINATION OF OUR FIELD DIRECTOR, MEDGAR EVANS, ON JUNE 12, 1963. MEDGAR ENCOURAGED MISSISSIPPI BLACKS TO GO TO THE REGISTRAR'S OFFICE AND REGISTER AND VOTE. NEITHER THE NATION NOR THE WORLD CAN EVER FORGET THE BRUTAL LYNCHING OF ANDREW GOODMAN, JAMES CHANEY, AND MICKEY SCHEWERNER IN THE SUMMER OF 1964. THEIR ONLY "CRIME" WAS HELPING TO MAKE DEMOCRACY WORK IN MISSISSIPPI FOR ALL OF ITS CITIZENS. ALTHOUGH THESE THREE WERE MURDERED AND BURIED, THEY DID NOT DIE IN VAIN BECAUSE BLACK FOLKS KEPT ON TRYING TO BECOME FULL-FLEDGED CITIZENS DESPITE THE PAINFUL CONSEQUENCES.

POLITICAL LIFE FOR BLACKS IN MISSISSIPPI SINCE THE PASSAGE OF V.R.A.

THERE HAVE BEEN SOME CHANGES IN MISSISSIPPI, ALTHOUGH WE STILL HAVE A LONG WAY TO GO. MISSISSIPPI HAS THE LARGEST NUMBER OF BLACK ELECTED OFFICIALS OF ANY STATE IN THE UNION---SOME 300. WE HAVE MORE BLACKS IN THE STATE LEGISLATURE THAN ANY OTHER STATE EXCEPT GEORGIA. YOU SHOULD BE AWARE, MEMBERS OF THE SUBCOMMITTEE, THAT THERE WERE THREE BLACKS IN THE LEGISLATURE. THEN, IN 1976, AS A RESULT OF A COURT RULING IN A REDISTRICTING SUIT, FOUR ADDITIONAL BLACKS GAINED SEATS. THREE YEARS LATER, IN 1979, WHEN CONNOR V. WALLER WAS DECIDED, I, ALONG WITH THIRTEEN OTHER BLACKS, GAINED A SEAT IN THE STATE LEGISLATURE. THE CONNOR SUIT WAS FILED IN 1964, ONE YEAR BEFORE THE VOTING RIGHTS ACT WAS ENACTED.

WHEN WE IN MISSISSIPPI TALK ABOUT THE SUCCESS OF BLACK POLITICAL ACTION IN MY STATE, WE ARE REALLY RESPONDING TO THE RESULTS OF THE 1965 VOTING RIGHTS ACT. ATTITUDES OF BLACK AND WHITE MISSIS-

SIPPIANS HAVE IMPROVED SIGNIFICANTLY, AS A RESULT OF THE V.R.A. AND WE BELIEVE STRONGLY THAT IF THE ACT AND ITS PROTECTIONS ARE LIFTED, THERE WOULD BE A DESIRE AND ACTION TAKEN BY MUCH OF THE WHITE POPULATION TO TURN BACK THE CLOCK AND WE WOULD, I DARESAY, EXPERIENCE A SECOND "RECONSTRUCTION", WITH MANY OF THE GAINS WE HAVE WON OVER THE YEARS LOST. WE ARE NOT, BY ANY MEANS, SATISFIED WITH THE GAINS WE HAVE MADE, BUT WE ARE DETERMINED NOT TO LOSE A SINGLE INCH IN A BACKWARD MOVEMENT.

NEED FOR EXTENSION AND STRENGTHENING OF THE VOTING RIGHTS ACT

MISSISSIPPI STILL HAS MORE DIFFICULTY THAN MANY OTHER STATES IN REGISTERING ITS CITIZENS. IN MISSISSIPPI, IT IS EASIER TO BUY A GUN OR GET A HUNTER'S LICENSE THAN IT IS TO REGISTER TO VOTE. TO REGISTER TO VOTE, A CITIZEN STILL HAS TO GO TO THE COUNTY COURTHOUSE AT THE COUNTY SEAT OR TO CITY HALL IN THE CITIES AND TOWNS. THERE IS NO DOOR-TO-DOOR REGISTRATION AND MOST OF THE STATE IS RURAL. PERSONS WHO ARE TOO OLD OR TOO ILL OR BEDRIDDEN TO GO TO THE COUNTY SEAT OR TO CITY HALL CANNOT REGISTER. THERE ARE NO PROVISIONS TO REGISTER THEM AND WE DO NOT HAVE DEPUTY REGISTRARS AS MANY STATES HAVE. MANY OF MY FELLOW CITIZENS IN THE STATE LIVE IN RURAL AREAS SOME 35-40 MILES FROM THE COURTHOUSE. A REGISTRATION TRIP MAY MEAN A 70-80 MILE ROUNDTRIP, IF ONE CAN AFFORD TO PURCHASE THE GASOLINE TO GET THERE.

RECENTLY, IN MY HOMETOWN OF CLARKSDALE---ONE OF THE METROPOLITAN AREAS OF MISSISSIPPI, NOT A STOP WAY BACK OUT IN THE COUNTRY, BUT DOWNTOWN MISSISSIPPI---I WAS DIRECTLY INVOLVED IN A CASE WHICH ILLUSTRATES THE NEED FOR STRONG VOTING RIGHTS LEGISLATION. IN THE FIRST PRIMARY OF THE MUNICIPAL ELECTIONS HELD LAST YEAR, A YOUNG BLACK CANDIDATE, JAMES HICKS, RAN AGAINST A WHITE MEMBER OF THE COMMUNITY, GRADY PALMER. THERE WAS A THIRD PERSON IN THE RACE. THE VOTE DIFFERENCE BETWEEN MR. HICKS AND MR. PALMER WAS FIRST ANNOUNCED AS ONE VOTE, THEN, LATER, AS TWO VOTES. MR. HICKS STARTED INVESTIGATING AND ALLEGED SEVERAL VOTER VIOLATIONS ON THAT ELECTION DAY

AS SEVERAL PERSONS REPORTED TO HIM THAT THEY WERE DENIED THE RIGHT TO VOTE. MR. HICKS BROUGHT THE MATTER TO MY ATTENTION. IMMEDIATELY I CALLED THE CHAIRMAN OF THE COUNTY DEMOCRATIC PARTY, MR. WILLIAM LUCKETT, AND LAID THE MATTER IN HIS LAP. HE ASSURED ME THAT AS CHAIRMAN OF THE COAHOMA COUNTY DEMOCRATIC PARTY, HE WOULD SEEK A FAIR RESOLUTION OF THE PROBLEM.

I REPORTED TO MR. HICKS ON MY DISCUSSION WITH MR. LUCKETT. MR. HICKS WAS NOT SATISFIED WITH A POLITICAL DECISION. HE WANTED A LEGAL DECISION TO REVERSE THE ANNOUNCED ACTION. I THEN CALLED THE ATTORNEY GENERAL OF THE STATE AND ASKED FOR RELIEF FOR MR. HICKS. ATTORNEY GENERAL ALLAIN INFORMED ME THAT THE OFFICE OF THE ATTORNEY GENERAL HAD NO FACILITIES TO DEAL WITH DIFFICULTIES IN A PRIMARY ELECTION. I THEN CALLED THE FEDERAL BUREAU OF INVESTIGATION CHIEF FOR MISSISSIPPI WHO INFORMED ME THAT, SINCE THIS WAS NOT A FEDERAL ELECTION, THE F.B.I. HAD NO JURISDICTION AND COULD NOT HELP. WELL, MR. CHAIRMAN, AFTER I HAD BEEN THROUGH THE SYSTEM, WITH NO RELIEF, I CALLED "OLD FAITHFUL", ATTORNEY GERALD JONES, THE VOTING SECTION CHIEF IN THE CIVIL RIGHTS SECTION OF THE UNITED STATES DEPARTMENT OF JUSTICE. A MEMBER OF HIS STAFF WAS ASSIGNED TO THE CASE; AN INVESTIGATION IS UNDER WAY AND AT LEAST MR. HICKS FEELS THAT THERE IS SOMEWHERE IN THIS NATION OF OURS THAT ONE CAN SEEK AND RECEIVE ASSISTANCE IN THIS TYPE OF CASE.

I CITE THIS BACKGROUND TO UNDERSCORE THE NEED TO EXTEND AND STRENGTHEN THE VOTING RIGHTS ACT. S. 1992 WOULD DO JUST THIS.

S. 1992 - FAIR AND EQUITABLE

I AM AWARE THAT SEVERAL PERSONS HAVE QUESTIONED THE PROPRIETY OF CERTAIN SECTIONS OF S. 1992. I AM PARTICULARLY CONCERNED THAT YOU, MR. CHAIRMAN, AND OTHERS WHO APPEARED BEFORE YOUR SUBCOMMITTEE, ARE OF THE MISTAKEN BELIEF THAT AMENDING SECTION 2 OF THE ACT TO PROHIBIT ANY ELECTION PRACTICE WHICH RESULTS IN A DENIAL OR ABRIDGEMENT OF THE RIGHT TO VOTE ON ACCOUNT OF RACE OR LANGUAGE

MINORITY STATUS, WOULD CREATE A RIGHT TO PROPORTIONAL REPRESENTATION. THIS SIMPLY IS NOT THE CASE. MOREOVER, THE PROPOSED "RESULTS TEST" IS MANDATED BY THE LEGISLATIVE HISTORY OF THE ACT AND CASE PRECEDENT. I ADDRESS THESE ISSUES BELOW.

WHEN THE VOTING RIGHTS ACT WAS FIRST INTRODUCED IN 1965, THE DRAFTERS OF THE BILL INTENDED THAT SECTION 2 REACH ANY ELECTION PRACTICE WHICH RESULTED IN THE DENIAL OR ABRIDGEMENT OF THE RIGHT TO VOTE. SO SAID THEN ATTORNEY GENERAL KATZENBACH TO THE SENATE JUDICIARY COMMITTEE IN RESPONSE TO A QUERY FROM SENATOR FONG:

> I HAD THOUGHT OF THE WORD "PROCEDURE" AS INCLUDING ANY KIND OF PRACTICE OF THAT KIND IF ITS PURPOSE OR EFFECT WAS TO DENY OR ABRIDGE THE RIGHT TO VOTE ON ACCOUNT OF RACE.
>
> [HEARINGS ON S. 1564 BEFORE THE COMMITTEE ON THE JUDICIARY, U.S. SENATE, 89TH CONGRESS, 1ST SESSION, PP. 191-92, 1965.]

CONSISTENT WITH THE EXPRESSED INTENT OF THE DRAFTERS OF THE V.R.A. FOR FIFTEEN YEARS, THE COURTS DECLINE TO IMPOSE AN INTENT STANDARD IN THE ACT. IN REACHING A DECISION AS TO WHETHER THE RIGHT TO VOTE HAD BEEN DENIED OR ABRIDGED, THE COURT EXAMINED A "TOTALITY OF THE CIRCUMSTANCES" AND MADE A DETERMINATION AS TO THE IMPACT AND RESULTS OF A CHALLENGED ELECTION SCHEME. [SEE WHITE V. REGISTER, 412 U.S. 755.]

NOT ONLY DID THE COURT DECLINE TO IMPOSE AN INTENT STANDARD IN SECTION 2 OF THE V.R.A., BUT IT WAS NOT UNTIL RECENT YEARS THAT THE SUPREME COURT CONSTRUED THE CONSTITUTION TO PROHIBIT ONLY INTENTIONAL VIOLATIONS. PRIOR TO 1976, THE COURT CONSTRUED THE CONSTITUTION TO PROHIBIT BOTH PURPOSEFUL DISCRIMINATION AND PRACTICES THAT HAD A DISCRIMINATORY RESULT. [SEE, E.G., FORTSON V. DORSEY, 379 U.S. 433, 439, 1965 (THE CONSTITUTION PROHIBITS PRACTICES THAT "DESIGNEDLY OR OTHERWISE" DILUTE BLACK VOTING STRENGTH);

GOMILLION V. LIGHTFOOT, 364 U.S. 339, 341, 1960 (FIFTEENTH AMENDMENT VIOLATION WHERE "INEVITABLE EFFECT" OF BOUNDARY CHANGE WAS TO DISPLACE BLACK VOTERS); NAACP V. ALABAMA, 357 U.S. 449, 461, 1957 (INDIVIDUAL LIBERTIES MAY BE ABRIDGED BY VARIOUS FORMS OF GOVERNMENTAL ACTION, "EVEN THOUGH UNINTENDED"); TERRY V. ADAMS, 345 U.S. 461, 466, 1953 ("NO ELECTION MACHINERY COULD BE SUSTAINED IF ITS PURPOSE OR EFFECT WAS TO DENY NEGROES ON ACCOUNT OF THEIR RACE AN EFFECTIVE VOICE IN THE GOVERNMENTAL AFFAIRS OF THEIR COUNTRY, STATE, OR COMMUNITY"---OPINION OF JUSTICE BLACK FOR HIMSELF AND JUSTICES DOUGLAS AND BURTON)]

ONLY IN THE PAST DECADE, DID THE COURT TAKE THE POSITION THAT TO PROVE DISCRIMINATION UNDER THE CONSTITUTION ONE MUST PROVE INTENT. [SEE, VILLAGE OF ARLINGTON HEIGHTS V. METROPOLITAN HOUSING DEVELOPMENT CORPORATION, 429 U.S. 252, 1977; WASHINGTON V. DAVIS, 426 U.S. 229, 1976.] BUT THIS PRONOUNCEMENT DID NOT MANDATE THAT THE SECTION 2 STANDARD ALSO BE "INTENT". FOR, AS YOU WELL KNOW, CONGRESS HAS THE AUTHORITY TO--AND THE U.S. HOUSE OF REPRESENTATIVES FOUND THAT IN ENACTING SECTION 2, CONGRESS DID, IN FACT, ENACT LEGISLATION WHICH GOES BEYOND THE CONSTITUTIONAL REQUIREMENT TO PROTECT RIGHTS SECURED BY THE CONSTITUTION. [SEE VOTING RIGHTS ACT EXTENSION, HOUSE REPORT, 97TH CONGRESS, 1ST SESSION, REPT. NO. 97-227, PP. 28-31 (1981). SEE ALSO, CITY OF ROME V. UNITED STATES, 446 U.S. 156 (1980); FULLILOVE V. KLUTZNICK, 448 U.S. 448 (1980); SOUTH CAROLINA V. KATZENBACH, 383 U.S. 301 (1966).]

WHEN THE SUPREME COURT IN MOBILE V. BOLDEN, 446 U.S. 55 (1980), CONSTRUED SECTION 2 AS MERELY RESTATING THE PROHIBITIONS OF THE 15TH AMENDMENT, IT DEALT A GREAT BLOW TO THE DECADES-OLD STRUGGLE TO PROTECT THE RIGHT OF ALL AMERICANS TO CAST A MEANINGFUL BALLOT. FOR, AS THE HIGH COURT HAS RECOGNIZED, PROVING INTENT IS A NEARLY IMPOSSIBLE TASK:

> [I]T IS DIFFICULT OR IMPOSSIBLE FOR ANY COURT TO DETERMINE THE "SOLE" OR "DOMINANT" MOTIVATION BEHIND THE CHOICES OF A GROUP OF LEGISLATORS. FURTHERMORE, THERE IS AN ELEMENT OF FUTILITY IN

> A JUDICIAL ATTEMPT TO INVALIDATE A LAW BECAUSE OF THE BAD MOTIVES OF ITS SUPPORTERS. IF THE LAW IS STRUCK DOWN FOR THIS REASON,...IT WOULD PRESUMABLY BE VALID AS SOON AS THE LEGISLATURE OR RELEVANT GOVERNING BODY REPASSED IT FOR DIFFERENT REASONS. [ACCORD, VILLAGE OF ARLINGTON HEIGHTS V. METROPOLITAN HOUSING DEVELOPMENT CORPORATION, SUPRA; WASHINGTON V. DAVIS, SUPRA; HAZELWOOD SCHOOL DISTRICT V. UNITED STATES, 433 U.S. 299 (1977); PERSONNEL ADMINISTRATOR OF MASSACHUSETTS V. FEENY 332 U.S. 256 (1979); DAYTON BOARD OF EDUCATION V. BRINKMAN, 433 U.S. 406 (1971).]

AMENDING SECTION 2 TO MAKE CLEAR THAT CONGRESS DID NOT INTEND FOR PLAINTIFFS SUING UNDER THAT SECTION TO HAVE TO MEET THE NEAR-IMPOSSIBLE BURDEN OF PROVING INTENT TO DISCRIMINATE, WILL NOT CREATE A RIGHT TO PROPORTIONAL REPRESENTATION. THE AMENDMENT CONTAINED IN S. 1992 WILL MERELY REVIVE THE LAW TO THE STATE WHERE IT WAS PRE-BOLDEN. IN THOSE CASES, THE COURTS REPEATEDLY HELD THAT "IT IS NOT ENOUGH TO PROVE A MERE DISPARITY BETWEEN THE NUMBER OF MINORITY RESIDENTS AND THE NUMBER OF MINORITY REPRESENTATIVES." [ZIMMER V. MCKEITHAN, 485 F.2D 1297, 1305 (5TH CIV. 1973). SEE WHITE V. REGISTER, 412 U.S. 755, 765, 766 (1973).]

THE PLAIN WORDS OF THE PROPOSED SECTION 2 AMENDMENT MAKE THIS POINT PATENTLY CLEAR:

> THE FACT THAT MEMBERS OF A MINORITY GROUP HAVE NOT BEEN ELECTED IN NUMBERS EQUAL TO THE GROUP'S PROPORTION OF THE POPULATION SHALL NOT, IN AND OF ITSELF, CONSTITUTE A VIOLATION OF THIS SECTION.

DESPITE THE CLEAR MEANING OF THE ABOVE LANGUAGE, MR. CHAIRMAN, YOU POSE THE SAME QUESTION IN YOUR OPENING STATEMENT ON THE FINAL DAY OF THE HEARINGS, AS YOU DID ON THE FIRST DAY, NAMELY, WHETHER THE AMENDMENT TO SECTION 2 CREATES A RIGHT TO PROPORTIONAL REPRESENTATION. YOU ASK WHAT, OTHER THAN THE PROPORTION OF MINORITIES

IN THE COMMUNITY IN COMPARISON WITH MEMBERS OF MINORITY ELECTED OFFICIALS, WOULD ONE LOOK AT TO MEET THE "RESULTS" TEST.

MR. CHAIRMAN, UNDER THE RESULTS TEST, AN ENTITY WOULD BE FOUND TO BE IN COMPLIANCE WITH THE LAW IF, ON THE TOTALITY OF THE CIRCUMSTANCES, THE CHALLENGED ELECTION PRACTICES DID NOT DILUTE THE MINORITY VOTE. IN DECIDING WHETHER THE CHALLENGED PRACTICE HAD A DISCRIMINATORY RESULT, A COURT COULD EXAMINE A NUMBER OF OBJECTIVE FACTORS, NAMELY, WHETHER:

- THERE WAS A HISTORY OF DISCRIMINATION AFFECTING THE RIGHT TO VOTE;
- THE ENTITY USED DEVICES OR PROCEDURES WHICH ENSURED THAT ONLY THE MAJORITY WOULD BE ELECTED, SUCH AS, A MAJORITY VOTE REQUIREMENT, AN ANTI-SINGLE-SHOT PROVISION, AT-LARGE ELECTIONS, NUMBERED POSTS, OR PURGING REGISTRATION ROLLS;
- THERE WAS RACIAL BLOC VOTING;
- THERE WERE ALL-WHITE OR PREDOMINANTLY WHITE POLITICAL ORGANIZATIONS WHICH CONTROL THE SLATING PROCESS AND EXCLUDE MINORITIES OR EMPLOY RACIAL CAMPAIGN TACTICS; OR
- MINORITIES HAVE EQUAL ACCESS TO THE MAJORITY.

IF THE ABOVE FACTORS EXISTED IN TANDEM (OR ANY SIMILAR OBJECTIVE FACTORS), AND IF THE FACTORS RESULTED IN THE DENIAL OR ABRIDGEMENT OF THE MINORITY VOTE, THE ENTITY LIKELY WOULD BE IN VIOLATION OF SECTION 2.

I SUBMIT THAT THE RESULTS TEST IS "AMENABLE TO CALIBRATION" AND THAT IT IS EQUITABLE. MOREOVER, THE AMENDMENT IS NECESSARY TO PROTECT THE MINORITY VOTE.

I URGE YOU AND OTHER MEMBERS OF THE SENATE TO ADOPT S. 1992, AS INTRODUCED.

PREPARED STATEMENT OF BARBARA MAJOR, OF THE LOUISIANA HUNGER COALITION AND THE LOUISIANA SURVIVAL COALITION

My name is Barbara Major, and I am the Chairperson of the Louisiana Survival Coalition, a statewide grassroots organization of low and moderate income people in the State of Louisiana. I also represent the Hunger Coalition.

On December 11-13, 1981, the Survival Coalition, the Hunger Coaltion and sixteen community, civil rights, labor and religious organizations sponsored a conference on "The Voting Rights Act and Achieving Minority Representation". At that conference, a number of people presented persuasive evidence that the Voting Rights Act must be extended in order that the citizens of Louisiana be guaranteed their right to vote.

Mrs. Pearl Bryant, president of the St. Helena Parish Little Citizens, and her daughter, Zenovia Bryant represented two generations of struggle in St. Helena Parish. They testified to cross-burnings and threats of having their home bombed. They suffered a loss of employment after they uncovered and reported that in their parish, dead people were still "voting" in 1971. They also led a fight against vote buying in their parish.

Representative Richard Turnley, president of the Louisiana Legislative Black Caucus, described another aspect of the process of disfranchisement. Three years ago, the U.S. Attorney for the Middle District of Louisiana in Baton Rouge charged that black organizations in the area were vote buying. Much publicity was generated, but not a single case of vote buying was found. The episode is seen by blacks in the Baton Rouge area as an attempt to weaken, discredit and destroy black political organizations and participation by blacks in the political process.

Malcolm Burns of the Parish of East Feliciana feels that the existence of the Voting Rights Act has been indispensible in his parish. Recently there was an attempt by white poll commissioners in his rural parish to intimidate black poll commissioners. The election was one to authorize bonds for the public school system: blacks supported the bond issue; whites, most of whom send their children to segregationist academies, opposed the issue. The issue was clearly a racial one. When threatened, the black poll commissioners cited the provisions of the Voting Rights Act which supported them, and the white commissioners backed down. It should also be noted that immediately before and after this election, for three or four weekends in a row, black persons' houses in the area were fired upon. Although we do not have evidence to support a conviction, it is clear that the shootings were designed to intimidate blacks from voting in the bond election, and from supporting the bond issue. A black female in the area, Chorsie George, was a leader of the fight for the bond issue and was blockaded by whites in her car as she was driving home. She escaped the blockade. The FBI investigated the blockade and the shootings, and after that investigation the shootings stopped.

Mr. Burns also noted that the new Louisiana Election law has provisions that the voting commissioners must attend a commissioner school before they are certified as commissioners for an election. In East Feliciana Parish, the school is held in the early afternoon, making it difficult for black working class persons to attend. This bit of manipulation by the white power establishment in East Feliciana has been at least partly responsible for the fact that the number of black commissioners in the area has gone from approximately fifty percent in 1974-75 to only 25-30 percent now, even though there is a large black population.

The most significant instances in which the Voting Rights Act has been important recently, however, has been the 1981 reapportionments of the Louisiana House of Representatives and the U.S. Congressional districts in Louisiana. Although the population of the New Orleans area fell during the last decade, the black population increased. Under the state house reapportionment plan, however, blacks in the New Orleans area lost four black majority district seats, while the white majority seats increased by one. Under the pre-clearance provisions of the Voting Rights Act, the State of Louisiana submitted its plan, which was objected to by three black representatives and the Survival Coalition. Just recently, the U.S. Justice Department requested move information from the state. Without the Voting Rights Act, the plan would have gone into effect without any consideration of the claims that it by design and by impact diluted minority voting strength in the New Orleans area.

The reapportionment of the Louisiana Congressional Districts is a similar story. Both house of the Louisiana legislature approved a plan by which one of our state's eight congressional districts would be centered in Orleans Parish (New Orleans). That district, as approved by both houses, would have been a majority black district. The Governor of Louisiana, David Treen, threatened to veto the plan and stated that a district centered in New Orleans was unacceptable to him. Under his proding. the legislature redrew the plan and split the New Orleans area into two districts. The gerrymandering was especially obvious when the plan was mapped out: the First Congressional District created a perfect profile of Donald Duck in the Second Congressional District. The thirty sided district was the primary focus of a challenge with the U.S. Department of Justice filed by various persons opposed to the plan. Just recently the Justice Department asked for more information of the State of Louisiana under the pre-clearance provisions.

No major jurisdiction in the state of Louisiana was able to fairly apportion itself in the 1970's. The federal courts drew lines for the state House of Representatives and the State Senate, for the City of New Orleans, the Parish of Caddo (Shreveport), Plaquemines Parish, Bogalusa City School Board, City of Minden, Parish of East Carroll, and so on _ad infinitum_. The black citizens of the State of Louisiana see the 1981 reapportionment of the state legislature and the U.S. congressional districts to be a continuation of politics as usual. There is no indication whatsoever that the white majority is willing to recognize the legitimate concerns and rights of minority citizens in the State of Louisiana: the actions of the legislature will be mimicked by the local city councils, parish police juries, and local school boards. Extension of the Voting Rights Act is essential to the protection of the minority citizens of Louisiana and of the nation.

PREPARED STATEMENT OF THE NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians is the oldest and most representative national Indian organization in America today. Since its formation in 1944, NCAI has served to represent the interests of Indian Tribes throughout the country. We have approximately 160 member tribes whose combined population is over 400,000.

We would like to submit for the record out support of S. 1992, a bill to extend key provisions of the Voting Rights Act of 1965. This Act has been one of continuing importance to Indian Tribes across this country.

The United States and Indian Tribes have a special relationship based upon the unique legal status of Indians under federal law. Federal policy has long recognized that Indian Tribes within the boundaries of the United States are distinct, independent political communities, retaining their original natural rights in matters of self-government. The Supreme Court has repeatedly held that the tribes have surrendered only those powers of sovereignty which are inconsistent with their dependent status. All other governmental powers still remain. As a result, Indian Tribes and the United States exercise a direct government-to-government relationship with one another.

(See "Analysis of the Budget Pertaining to Indian Affairs, Fiscal Year 1982," A Report of the Select Committee on Indian Affairs of the United States Senate, Committee Print, June 1981.)

Since we were first here long before the first immigrants arrived from across the Atlantic, our languages clearly are, anthropologically and historically, the first languages of this land. There are 206 different spoken Indian languages among the tribes today. Of this number, only 80 have writing systems, most of which have not been tribally endorsed. The percentage of adults living on reservation lands who are not fluent in English ranges from zero to between 60 and 70%, and generally, where there is no fluency in English, there is a correlative lact of literacy in the native language. Therefore, oral translations and interpretations of ballot information are of maximum assistance on voting within Indian communities.

Our support for the Voting Rights Act stems from a long history of trying to secure the vote for our people. The people of this country are too willing to forget the history of Indian people. Some of the comments made by Congressional representatives regarding the Voting Rights Act ignore the situation of Indian people. This country and Congress should remember that American Indians were not accorded citizenship until 1924 and therefore, we were not eligible to vote. Yet it wasn't until the 1960's that Indians were able to fully secure the right to vote in federal elections. We would also hope that members of Congress would recognize that we are not immigrants or so-called aliens. Our history of having democratically elected leadership far exceeds the history of the western world. The Indian Tribes in the area called the United States were practicing the concepts of democratically-elected governments when Europe toiled under the feudal system.

Yet Indian people have been frustrated in securing their right to participate in various elections even today. We have reviewed the records of the Office of Indian Rights within the Department of Justice and have found that approximately 20% of the cases they handled were Voting Rights cases. And this only refers to those situations where litigation was necessary.

Indian people have experienced a considerable amount of blatent discrimination in voting rights during recent years. One Wisconsin town attempted to gerrymander Indians out of their voting districts (in the tradition of Gomillion v. Lightfoot, 364 U.S. 339 (1960)) in an active attempt to keep them from voting. United States v. Bartleme, Wisconsin, Civil Action No. 78-C-101 (E.D. Wisc. 1978). In a Nevada county, county registrars refused to register Indians for such reasons as failing to fill out registration cards properly, while non-Indians were not subjected to the same fine scrutiny. United States v. Humboldt County, Nevada, Civil Action No. R78-0144 HEC (D. Nev. 1979). Nebraska and New Mexico counties were successfully sued for attempting to dilute (and thereby effectively destroy) the Indian vote by instituting at-large voting schemes. United States v. Board of Supervisors of Thurston County, Nebraska, Civil Action No. 78-0-380 (D. Neb. 1979); United States v. San Juan County, Civil Action No. 79-507JB (D.N.M. 1979). In South Dakota there was an attempt to deny an Indian candidate the right to run for office. United States v. South Dakota and Fall River County, Civil Action No. 78-5018 (S.D.). Indians have found themselves purged from election rolls without notification, or their polling places closed. Apache County High School District No. 90 v. United States, Civil Action No. 77-1815 (D.D.C. three-judge court, 1977).

The Voting Rights Act has been a key element in the drive to bring the vote to Tribal people.

One of our primary concerns is in relation to the bilingual provisions of the Voting Rights Act (Sections 203 and 204), which have been under heavy attack almost from inception. These provisions have been viewed as being bad for the people for whom they are to assist. This assistance is thought to encourage neglect in learning English. Unfortunately, many people fail to understand that often within the Indian community it is the elders who preserve the culture--through traditional skills, including the richness of a native language with which to tell the stories of the peopl, essential to understanding our history and traditional ways of thinking.

A Voting Rights case brought under the bilingual election law provisions in New Mexico (Apache County High School District No. 90 v. United States, Civil Action No. 77-1815 (D.D.C. three-judge court, 1977)) resulted in a federal court determination that the Navajo people had been denied the right to vote because of lack of information provided through radio and television outlets in their own language, and failure of the county to provide interpreters at the polls. Even where translators were provided, they were inadequately trained in cross-cultural interpretation. For example, there is no translation of "bond election" into Indian culture. (See attached affidavit of Dr. Robert Young and Dr. William Morgan.) One on-reservation precinct translated the bond election ballot and placed it on cassette tapes which were available in each of the polling booths to assist Navajo language voters. From information provided to NCAI, this was an inexpensive and effective procedure--one we hope might be expanded to other tribes. However, one our concerns with the bilingual provisions is the amendment to Section 208 which does not allow voting assistance in a voting booth, unless the voter is physically handicapped. We assume that the terms "voting assistance" in this amendment will not be construed to include the type of oral bilingual assistance as mentioned before, or an interpreter. For some Indian people some form of oral bilingual assistance is the only way in which the bilingual provisions can be put into effect.

Another area of concern to Indian people is the preclearance provision of the Voting Rights Act. Section 5 of the Act requires covered jurisdictions to submit all changes in laws, practices, and procedures affecting voting for a ruling that the changes do not discriminate against racial or language minorities.

Under this section, the Justice Department's Office of Indian Rights has brought three cases since Section 5 was extended to language minorities in the 1975 Amendments. United States v. South Dakota, Civil Action No. 79-3039 (D.S.D. 1979); United States v. Tripp County, South Dakota, Civil Action No. 78-3045; Apache County High School District No. 90 v. United States, supra. Additionally, preclearnace has been a component of other cases brought by the Justice Department under the Act. These provisions have been very important in the protection of Indian voting rights.

Additionally, we feel that any attempt to bar the votes of other minorities affects us, too. For example, if there is a bar based upon Hispanic surname or facial characteristics, many Indians would also be included.

Our people strive to preserve our culture and tradition of which our native language is the most vital part. Our history and religion are entertwined with the continuation of the language of our people. And yet our people seek to understand the dominant society that has grown up around us and which controls so many aspects of our lives. Our people are learning that they must vote if they are to protect themselves and their way of life.

Therefore, we believe that the Voting Rights Act of 1965 must be extended in order to protect the rights of American Indians who want to vote in various elections. We wholeheartedly support S. 1992.

AFFIDAVIT

CITY OF ALBUQUERQUE)
) SS
STATE OF NEW MEXICO)

I, Dr. Robert Young, and I, Dr. William Morgan, being first duly sworn, state the following:

We are experts in the Navajo language. Attached to this affidavit in offer of substantiation of this fact are a Curriculum Vitae of Dr. Young and a resume of Dr. Morgan. We have worked as a team in translating a number of documents and works, a list of which is also attached. In our work for the United States Department of the Interior in the 1930's, we developed what is now the accepted and most widely used form of written Navajo. In addition we state:

A great number and variety of techniques have been applied over the course of the years as succeeding generations of Americans searched for an effective solution to Indian problems. At one period, Indian children were removed from their homes and placed in distant boarding schools in an effort to disassociate them from their tribal language and way of life, on the theory that the vacuum thus created would be filled by English and the Anglo-American cultural system. The results were disappointing; although many variations of the approach were tried, success was elusive and minimal. The result among the Navajo is that the culture and the language remain very strong to this day. The use of the Navajo langauge is widespread throughout the Navajo Reservation.

Culture as used in this discussion refers to the varied systems developed by human societies as media for adaption to the environment in which their members live; in its totality, a cultural system constitutes the means through which the group to which it pertains achieves survival as an organized society. Such systems range from the simple to the complex and sophisticated and, among themselves, they exhibit a wide variety of differences in form and content.

When we speak of the culture of a society or community, we refer to the entire gamut of tools, institutions, social values, customs, traditions, techniques, concepts and other traits that characterize the way of life of the group.

The content of a given cultural system is determined by a wide range of factors, including the physical environment, inventiveness, influence of surrounding communities, trade, opportunities for borrowing, and many others.

Borrowing and trade have had a tremendous influence on cultural content, in modern as well as in ancient times, and a cursory glance at the present day Navajo or, for that matter, virtually any community of people anywhere on earth, is sufficient to reflect the importance of these avenues for cultural change and growth.

Horses, sheep, goats, iron tools, wagons, automobiles, radio, television, and many other elements have been borrowed by, and have become part of the cultural systems of such people as the Navajo since their first contact with Europeans.

The fact is that a culture is more than a system of material and non-material elements that can be listed, catalogued and classified. A culture constitutes a complex set of habits of doing, thinking and reacting to stimuli--habits which one acquires in early childhood and which, for the most part, he continues to share, throughout his life, with fellow members of his cultural community. In its totality, a cultural system is a frame of reference that shapes and governs one's picture of the world around one. Within this framework and within the frame of reference imposed by the structure of the language one speaks, one is conditioned to look upon the world about one in a manner that may differ substantially from that characterizing another and distinct cultural system.

The nature and function of language assume different perspectives as they are examined by different disciplines--the psychologist, the philosopher, the linguist, the physiologist and the anthropologist are each concerned with different facets of the phenomenon of speech--but, from the standpoint of the social scientist, a language becomes an integral part of the culture of the people who speak it or, for that matter, who use it in any of its several secondary forms (writing, gestures, signals, signs, mathematical formulae, artistic and other representations). Whatever its form, language comprises a set of signals that serve the need, in human society, for the inter-communication of ideas and concepts. In addition, the structure and content of a given system of speech--in combination with associated cultural features--establishes a frame of reference within which the process of reasoning itself takes place; it is a framework that molds the world-view of the speakers of a given language, and one that tends to confine that view to the boundaries and perspectives of the cultural system in which such speakers are participants. Like the rest of culture, a system of language, with its characteristic patterns of expression, elements of phonology and structural features, comprises a complex set of distinctive habits. In short, the sum total of the values, attitudes, concepts and mode of expression of a community constitute the frame of reference within which its members conceive of, look upon, describe, react to, and explain the world in which they live and their relationships with it--it is their window on the universe.

The lexicon, or elements of vocabulary of a speech system can be compared to the material elements (tools, weapons, etc.) of culture. Such elements of speech, like tools, may be borrowed from another language system, or existing terms, like existing tools, may be modified to meet new requirements. Words, as these units are commonly called, again like tools, may come and go.

As cultures change--and none are static--those changes reflect in language, because, as we have pointed out, language itself is a reflection of the total culture of its speakers--a catalog and transmitter of the elements and features of the entire social system.

A great many concepts are widely dispersed among human societies across the globe, shared in one form or another by the people of widely separated communities. Some are inherent in the very nature of things--all people share the concepts denoted by walk, run, eat, talk, see, sleep, hear, for example. Although different speech communities may conceive and express these ideas in a variety of forms and patterns, the basic concepts are the common property of all cultures.

Thus, both English and Navajo include terms with which to express the concept walk. However, they do not express it within the same frame of reference. Among the distinctions with which both languages are concerned is the number of actors: English he walks (singular) and they walk (plural); Navajo: yigááł, he is walking along; yi'ash, they (two) are walking along; and yikah, they (more than two) are walking along. Both languages express the concept walk, and both concern themselves with the number of actors, but here the similarity ends between the two speech forms. Unlike English, Navajo is here concerned with distinguishing number in three categories as one, two, or more than two actors. Furthermore, if more than two actors are involved, their action of walking may be conceived as one which is performed en masse--collectively: yikah, they (a group of more than two actors) are walking along; or it may be viewed as an action performed by each individual composing the group in reference: deíkááh, they (each of a group of more than two actors) are walking along.

Both languages can express the simple command, Come in--but the English form does not concern itself even with the number of actors. Come in may refer to one person or to a plurality of persons. In Navajo, the feature of number remains important: Yah'aninááh, come in (one person); Ya 'oh'aash, come in (two persons); Yah 'ohkááh, come in (more than two persons). In addition, the action as it involves a plurality of more than two persons may be conceived, from the Navajo viewpoint, as one in which they respond one after the other--collective in contrast with segmental action. Yah 'ohkááh directs a group of more than two persons to come in en masse; if the group is too large to permit the action to be performed simultaneously by all of the actors, the form yah 'axohkááh is more appropriate since it has the force of directing each member of the group to perform the action, one after another--segmentally.

Although Navajo and English share the concepts involved, the pattern governing their expression in the two languages is highly divergent. The two speech communities differ from each other in this aspect of their world view.

The basic concept expressed by the English term Come in and its Navajo correspondents, is no doubt held in common by all people, irrespective of cultural-linguistic differences, but the pattern governing the manner in which the action is conceived and expressed differs radically between the two languages. However, given that all the essential elements requiring expression with regard to the idea are known (number of actors, manner of performance of the action) to the translator, there is no difficulty involved in conveying it from the English to the Navajo language. It is merely a matter of selecting an appropriate Navajo form to fit the situation as it is conceived from a Navajo viewpoint. And the same idea, as variously expressed in Navajo, can readily be conveyed in English by simply ignoring the several connotations that require expression in Navajo, but which are customarily left to the imagination of the listener in English. Neither is there any essential difficulty involved in expressing, in Navajo, concepts relating to come, go, walk, arrive, meet, join, etc. providing certain essential elements such as number of actors, identity of verb subject, mode and other features attaching to the action are known to the translator.

This relative ease of translation attenuates and finally disappears as the range of concepts held in common gives way to conceptual areas that are not shared by the two contrasting cultural-linguistic systems. At this point translation becomes impossible for the obvious reason that a language does not include terms for the expression of concepts that lie entirely outside the culture to which it belongs. Therefore, interpretation enters as the medium for cross-cultural communication. Sleep, walk, eat axe, needle, hat, good, high, sharp are common to both Navajo and English; atom, rhetoric, navigate, one fourth, two sixths, acre foot and the like represent concepts that are not shared by Navajo culture and for which, consequently, there are no convenient labels in the Navajo language. The latter terms represent ideas that lie outside the Navajo world. As a result, they can be communicated from English to Navajo only by a descriptive, explanatory process to which we are here applying the term interpretation--in contradistinction to translation, which we are reserving to describe the process of trans-cultural, trans-linguistic communication by applying approximately corresponding word labels available in both languages.

To be effective, the interpreter must be thoroughly bi-lingual and bi-cultural. He must himself understand a concept sufficiently to describe it in terms that are meaningful to, and related to the experience of, his audience. Anyone who has listened to the interpreter at the Navajo Tribal Council has been aware of the greater length of time required for the communication of certain ideas, in the Navajo language, than was necessary for their original expression in English. In such situations the process reflects the necessity on the part of the interpreter to develop, define, and describe an alien concept through a clever descriptive process. If such an idea is involved as that conveyed, in English, by the term *acre-foot*, the interpreter may need to begin by reminding his audience of the existence of a coined Navajo term náxásdzo xayázhí (small delimited area) which is used with a fair degree of frequency as the Navajo label for *acre*. Assuming that all of his listeners appear to recognize and understand the term, he can then proceed to describe an acre-foot of water as the amount necessary to cover one acre of land to a depth of one foot. If, on the other hand, his listeners do not have the concept denoted by acre, he may have to begin by defining náxásdzo xayázhí as a square whose sides each measure about 208 feet. Having established the concept acre, he may then proceed to describe an *acre-foot*. Obviously, to accomplish his purpose, he himself must know the concepts involved in the English terms.

The demand on the *interpreter*, in the sense in which we are applying the term, can be much greater than those placed on the *translator*. A translator of English into Spanish does not, in fact, need to know what an *acre-foot* is in order to convey the idea to a Spanish speaking audience. It is enough that he know the term *acrepié*; it is not necessary that he be able to define it.

And, of course, the process of interpretation across cultures goes in both directions. There are concepts in Navajo culture that are absent in Anglo-American society. The Navajo term ńditį́į́h attaches to an object that is not used by Anglo-Americans--consequently, there is no convenient corresponding English label with which to describe or identify it. It must be described in terms of its physical characteristics and its functions, as "a broom-like thing made of the wing feathers of the eagle, tied together at the quill end, and used ceremonially to brush away evil from a sick or moribund person." This description is sufficient to convey as much of the concept involved to the English speaking listener as was conveyed to the Navajo listener by simple definition of the term acre-foot. Actually, in both cases, full understanding can take place only with description of the alien concept in much greater depth and detail.

Interpreters serving the Navajo and other Indian tribal needs were poorly selected and underpaid for many years. Underpayment and poor selection reflected an abysmal lack of understanding of the complex problems involved in cross-cultural communication, and the "economies" effected were offset by a correspondingly enormous cost in the form of both money and human misery. It was too commonly assumed that the interpretational process involved little more than inter-linguistic translation--a service that any school-boy could perform. Janitors, cooks, and scrub-women were drafted into service as intermediaries between doctors and patients in the diagnosis of disease; members of an audience, or other persons selected at random, had the responsibility for explaining complex technical concepts involving ideas as vague and foreign to their experience as the Quantum Theory is to most laymen in our own society.

Tests were administered in the early 1960's to a variety of interpreters who had acted as intermediaries, for long periods, in the communication of data and concepts relating to such fields as medicine, social welfare and soil conservation. The results have all too often reflected a shocking lack of understanding of the technical concepts with which they were concerned, and the need for interpreter training began to receive due emphasis--along with the need to select and pay these valuable technicians on a more realistic basis.

Cross-cultural interpretation involving, as it does, the explanation of concepts which lie outside the experience of the cultural-linguistic system of the receiver, requires special training and highly developed communicational skills on the part of the interpreter. Just any bilingual person, chosen at random, is not sufficient. In fact, the effectiveness of cross-cultural communication can be greatly enhanced if the English speaking technician, for whom an interpreter acts as intermediary, himself has some modicum of understanding of the cultural and linguistic factors that limit ready understanding on the part of the receivers --i.e., if he himself has a degree of insight into the culture and language--the world-view--of the people to whom he addresses himself. To draw an analogy, the lawyer is more likely to succeed in explaining the bonding process to the layman-interpreter if he knows something of the educational background and previous experience in these matters on the part of the person or audience to whom he addresses himself. If he uses the somewhat esoteric language of lawyers, he may find that his listener-interpreter has received little or no insight into the subject. If, on the other hand, having informed himself previously regarding the educational and experimental characteristics of his listener-interpreter, he couches his explanatory remarks in terms that lie within the scope of their experience and understanding, the effectiveness with which he communicates is likely to be greatly increased. If the listener-interpreter then has a sufficient understanding of the language into which he is to interpret this material, he will be much more effective.

We received from Lawrence R. Baca, Attorney for the United States, a copy of the Order and Call of the August 31, 1976, Apache County High School District No. 90 Special Bond Election. Attached to this affidavit is a copy identical to that given to us. Mr. Baca instructed us to translate the document into the Navajo language. He instructed us to translate it in such manner that a voter who spoke only the Navajo language would be able to understand the document and be able to vote in the said election leaving out the list of polling places. Working as a team as we always have in translations, we took the following steps:
Dr. Young went to the School of Business library and got some books on general obligation and other types of bonds and bonding generally so that we would have a clear idea of how he wanted to approach the idea of a general obligation bond. Dr. Young then took the original document and rewrote it in a form that lent itself to translation into Navajo. He avoided to the maximum extent possible the use of any terms for which there is no Navajo equivalent, such as the word "bond." With those words for which

there is no Navajo equivalent it was necessary to define and explain the term and then use the English word. This is the same approach that is used by the interpreter for the tribal council, and that we have always used. In this case, we used the word bond after having described and defined it. This should give the listener an adequate understanding of what one means when one uses that word. Thereafter in the translation, one simply uses the English word that one has so defined, and it will have meaning to the listener. This step took approximately two hours. Then Dr. Morgan took the English version that Dr. Young had drafted and translated it into Navajo. It took Dr. Morgan approximately eight hours to do the translation from English into Navajo. Then we went over the translation together and translated it back into English to find what was said in Navajo. There were a couple of areas where Dr. Morgan had gone off on a slight tangent because he had not fully understood Dr. Young's explanation of what it was necessary to say. After a discussion of these areas, Dr. Morgan spent three more hours in retranslation of the parts we felt needed more work. The total time necessary for these final corrections was five hours. We worked together two more hours to assure ourselves of a good translation. The total time that we took to do this translation, not counting typing of drafts and final copy, was twenty-one man hours. This translation is not perfect. It is very good, however. The subject matter and kind of material is very difficult to translate. It is our expert opinion that this is far better than any that would have been done on the reservation unless someone went to the great lengths that we did.

It was necessary to go to these great lengths because of the subject matter. The subject matter is foreign to the Navajo culture. If it is foreign to the culture, it is foreign to the language. There is no Navajo word for bond. This concept is one that has not been introduced into the Navajo world sufficiently for it to have been adopted or borrowed as part of the Navajo world. Therefore, one has to force the language to somehow represent the basic concepts that one is trying to get across. To accomplish this, one must do a lot of explaining and defining of terms and ideas in order to pull it all together and say what has been said in English. The English version is part of the non-Navajo culture, and it is, of course, adequately expressable by the language to which it pertains. This is true because the language and concept of bond are a part of the same culture. When you attempt to put this concept into a language of a culture that it is not a part of, you must begin by having a good understanding of the concept you will translate. When translating we have always taken the steps listed above. Dr. Young would take highly technical documents like statutes of Congress and study, analyze, rephrase, and rewrite them in the kind of English that one would use to explain it to someone whose experience this was not a part of. He would, of course, draw on his own background, knowledge, and experience with the Navajo language, knowing what could be readily translated and what would be difficult. For those things that would be difficult, Dr. Young would have to determine some manner in which the translator could approach it. This is what must always occur in translation. The translator must reduce the matter to something that he himself clearly understands. Once he works it out on that basis, he can proceed to apply the Navajo language to the expression of those concepts. In some instances this was not easy with the Order and Call of the election. The entire last section discussing the repayment and maturity of the bonds was somewhat difficult to clearly express in Navajo. The English version may sound somewhat naive, but that is the way it will have to be explained in Navajo.

In our expert opinion, it would not be possible for someone to read this and do a simultaneous or extemporaneous translation. One would have to study it and determine how one is going to express it in Navajo. Any material that has technical language or overtones must be defined and explained. Simultaneous or extemporaneous translation is only possible between two groups that share the same cultural concepts. The words or labels represent short cuts. One does not have to define or describe terms because the listener will have learned them as part of his socialization process. The translator for the Navajo Tribal Council will take three or four times as long as the original speaker does to explain what has been said if the material has some technical or legal terminology with which the audience is not familiar. We know from personal contacts with him that he likes to have any of this difficult material in advance so that he can study it and work up an explanation to use in his translation before the council. The result in extemporaneous translation of difficult material is that the translator will gloss over those things of which he does not have a firm understanding. We have witnessed this at meetings where there is not proper preparation of the translator or where some member of the audience is asked to please step up and translate.

Mr. Baca has explained to us the steps that were taken to publicize the bond election on the Navajo Reservation. As we understand them, they were: (1) A written notice in the Navajo Times legal notice section for five weeks prior to the election; and (2) Postings of the same written notice at the polling places and two public buildings for twelve days prior to the election. That written notice was the same Order and Call that we have translated. It is our expert opinion that these acts would not have notified the Navajo people adequately about the bond election. Those who could read would have found out, at most, that there was an election. If we were to publicize such an election, we would use the radio. We would use the chapter meetings also, but rely very heavily on the radio. Most of the Navajo people still live in rural areas on the reservation. They do not live in clustered communities. Communities have been developing over the last thirty years, but the people generally live out in the countryside. The roads that serve these people are poor. If there is a heavy snow or a fair amount of rain, one cannot travel anywhere. One gets snowbound or mud-bound. To really reach those people with information, one must use the radio. Almost all of the Navajos living out in the countryside have radios, and they constantly listen to the Navajo language programs. One could use the same kind of translation that we have done and tell them where to get more information. If they were to get no more information than is in the Order and Call, most Navajos would think that the money was going to be for the benefit of their schools. They would think that if it were not for the benefit of their schools, that they would not be asked to vote. Navajo people are very interested in education. They believe that the education of their children is essential. The Navajos who have gone away from the reservation during the war or for some other reason quickly realized the difficulty in getting along in the outside world without knowledge of the English language. They have demanded for many years that education be provided for their children. Because of the importance that Navajos place on education, they would have been very interested in knowing what benefit or effect this bond election had on their schools.

All bilingual people are not necessarily good translators. To some extent there is the depth of understanding that the person has of the two languages. If the two languages involve cultural systems that are as far apart as Navajo and English, then the individual who does the interpretation has to know the two cultural systems in great depth. He must be more than just able to communicate in both languages. He must be educated on the English side so that he understands all of the particulars of this bonding procedure. It would be important to know how local government relates to the community, what a school district is, and how it serves the community. He should know how the school system gets its money, and how it pays it back. All of these aspects of this process called bonding are important. Having this complete understanding on the one hand and understanding that his other linguistic personality (Navajo) does not contain these things, the translator is going to have to determine what aspects on the English side are going to require careful or detailed explanation to the Navajo side. The translator must also have a depth of command of the Navajo language that permits him to find the right terminology to express these unfamiliar concepts. This means that you must have an individual who has been specially trained. In our opinion, there are not many Navajos in Navajo country who possess these abilities.

However, if one has an individual who is bilingual, and who has a good depth of understanding of the Navajo language, one can develop a good translation. If the original speaker takes the time to explain the bonding process to the bilingual interpreter so that he thoroughly understands it, he will then be able to develop a fairly good interpretation. If, however, the bilingual interpreter does not completely understand the process, he will simply gloss over those parts that he does not understand. Since the person he is speaking to does not read English, he will not complain that the translation is poor or incomplete. If one took twenty-two people who are bilingual and asked them to translate this document (the Order and Call) without any training or explanation, one would face disaster. One cannot pick translators off of the street and expect them to do a good job without a good explanation. Thus, the steps taken by the Apache County High School District No. 90 to publicize the bond election in question appear, in our opinion, to be wholly inadequate.

Robert W. Young

William Morgan, Sr.

Subscribed and sworn to before me this [illegible] day of October, 1978.

Karen E. Dudley
NOTARY PUBLIC

My Commission Expires:
October 9, 1979

CITIZENS FOR KNOWLEDGEABLE VOTING (415) 681 - 7749
137 Riooli Street
San Francisco, California 94117

December 9, 1981

Senator Orrin G. Hatch
Room 125 Russell Bldg.
Washington, D.C. 20510

Re: Repeal of Multilingual Provisions of the Voting Rights Act of 1965

Dear Senator:

San Francisco has once again set a precedent (unfortunately in this case) by mandating an outreach program to register non-English speaking persons to vote. A Consent Decree was signed on May 7, 1980 with the San Francisco Board of Supervisors, providing authorization for settlement of the litigation. This resulted from a suit filed by the U. S. Attorney's Office against the City and County of San Francisco for non-compliance with the 1975 multilingual provisions.

This was not the will of the people. A poll taken by the San Francisco Chronicle in March 1980 indicated that 84% favored ballots in English only. Since 1976 California has had post card registration. Therefore, verification of citizenship is no longer attested to, as the person signs the affidavit without witnesses. Illegal aliens have been found to be working in San Francisco agencies in violation of their visitor's visas, and the city is no longer asking job applicants if they have a legal right to work in this country as it was feared such a question might be discriminatory. (Guy Wright's column, S.F. Examiner 11/1/81) In San Jose, California a check by the District Attorney and the Immigration Service of voters' rolls showed non-citizens registered. It was also reported by the Border Patrol that affidavits of registration receipts were being shown as proof of citizenship on border crossings. Incidents such as this point up the necessity of guarding our Constitutional voting rights.

An extensive amount of documented material was sent to the Civil and Constitutional Rights Sub-committee of the Committee on the Judiciary of the 96th Congress (Cong. Don Edwards, Chairman) in June of 1980 stating these concerns. For your information we are enclosing a copy of that letter.

A report on the compliance with the Consent Decree by the Registrar of Voters after the November 3, 1981 local election was made to the U.S. Attorney and the U.S. District Court with a copy to the Citizens Committee on Elections, formed under requirements of the Consent Decree and composed of eleven members appointed by the Mayor and the Board of Supervisors. A statement made to the Committee from the Chief Deputy Registrar on September 1, 1981 pointed out "The Consent Decree requires at least two bilingual poll officers in precincts that contain at least 25% or more Chinese or Spanish speaking voters. The main difficulty with this is that these statistics are not available.

There is no ethnicity question on the registration form, so we do not even know how many Chinese and Spanish voters there are, let alone how many of them are Chinese or Spanish speaking." A computer search is planned for the future of voters with Chinese or Spanish surnames, although this would not reveal how many people speak Chinese and Spanish or are of that nationality. In an outreach program (called for in the Consent Decree) it is impossible to determine who belongs to an ethnic minority, as a surname if not an indication of their ethnic origin. Such a search would be an invasion of privacy and might be the type of thing they moved to this country to avoid.

One thing that keeps coming up from the Hispanic community is that the Treaty of Guadalupe Hidalgo 1848 covers the right to vote in the Spanish language. We have read this Treaty and find nothing in it to substantiate this claim. Voting in a foreign language is divisive and demeaning to naturalized and native born citizens who cherish their voting rights and the English language, and written ballots in a language other than English may be really a moot question because of illiteracy in any language. No other country throught the world permits its citizens the right to vote in a foreign tongue. We must not become a Balkanized nation or another Quebec, but one that chooses to unify our citizens through a common language and a sense of pride in the rights of American citizenship.

More effort should be made to ensure the teaching of English. Much time, public relations and governmental endeavor has been devoted to the integration of new citizens, and now by "polarizing" them into their ethnic languages and environments, our government is nullifying what has been accomplished.

Thank you for your consideration of our views.

Sincerely,

Anna Guth

Anna M. Guth, Chairman
(Mrs. Leland Guth)

P.S. A copy of the Consent Decree and the Report of the Registrar of Voters has been sent to the Senate Majority and Minority Leaders.

National Conference of State Legislatures

Office of
State
Federal
Relations

444
North Capitol
Street, N.W.
2nd Floor
Washington, D.C.
20001
202/624-5400

President
Ross O. Doyen, President of
The Kansas Senate

Executive Director
Earl S. Mackey

SFA Steering Committee

EXTENSION OF VOTING RIGHTS ACT

Whereas the Voting Rights Act of 1965 as amended, has been correctly called the "most important civil rights legislation enacted;" and

Whereas Black voter registration has more than doubled in these covered jurisdictions and the number of Black elected officials have proportionately increased; and

Whereas, discriminatory results are more accurate indicators of discriminatory voting practices than proof of intent, which the Supreme Court sanctioned in Mobile vs. Bolden.

Now, therefore, be it resolved that the National Conference of State Legislatures supports the extension of the Voting Rights Act of 1965 with possible modification.

Then be it further resolved that the National Conference of State Legislatures transmit a copy of this resolution to the President of the United States and the members of Congress.

-Adopted by the National Conference of
State Legislatures, July 31, 1981

H LEGISLATURE, 19 81
STATE OF HAWAII

S.R. NO. 210

SENATE RESOLUTION

REQUESTING THE UNITED STATES CONGRESS TO PERMIT STATES TO ESTABLISH THEIR OWN PROGRAM TO MEET THE BILINGUAL REQUIREMENTS OF THE VOTING RIGHTS ACT AMENDMENTS OF 1975.

WHEREAS, the 1975 amendments to the Federal Voting Rights Act of 1965 were designed to encourage full participation in the electoral process by citizens of this country; and

WHEREAS, the amendments require certain states and their political subdivisions to conduct elections in the language of a language minority group which comprises more than 5% of the citizens of voting age of a state or political subdivision and which has an illiteracy rate as a group of higher than the national illiteracy rate; and

WHEREAS, the amendments to the Voting Rights Act defines "illiteracy" as a failure to complete the fifth primary grade; and

WHEREAS, based on the foregoing criteria the Director of the Census, as authorized by the amendments, identified the following language minority groups in Hawaii: Ilocano in all countries, Japanese in Hawaii and Kauai Counties, and Chinese in the City and County of Honolulu; and

WHEREAS, there are many individuals in Hawaii who have learned to read and write the English language without formal education and would therefore not require a foreign language ballot, but are deemed nonetheless to be illiterate for purposes of the Voting Rights Act amendments; and

WHEREAS, the experience of the 1976, 1978 and 1980 elections indicate that the printing of voter information forms and ballots in foreign languages is a financial burden on the State, especially when only a few foreign language ballots are requested by voters; and

PAUL D. COVERDELL
District 40
2015 Peachtree Road, N.E.
Atlanta, Georgia 30309

MINORITY LEADER

The State Senate

Atlanta, Georgia 30334

March 5, 1982

Honorable Orrin G. Hatch
Chair, Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
411 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

My purpose in writing this letter is to express concurrence with the co-sponsorship by Senator Mack Mattingly (R-GA) of S.1992 extending the Voting Rights Act of 1965.

I agree with Senator Mattingly that the need for continuing Section 5 of the Act has been fully documented in the Committee hearings of both the House of Representatives and the Senate, and that Section 2 must be amended to restore the law as it existed prior to the decision in City of Mobile v. Bolden.

The proposed amendment to Section 2 expressly disavows any test of proportional representation and would not result in the imposition of racial quotas for elected office. To the contrary, enactment of the amendment would merely allow racial minorities who have been traditionally excluded from equal political participation by such devices as literacy tests and all white primaries to challenge election procedures which continue to perpetuate the effects of past discrimination.

After reading the Supreme Court's decision in White v. Regester, and lower court opinions concerning it, I am satisfied that the charges that an amended Section 2 will require quotas are completely unfounded. Prior to Mobile, no jurisdiction was ever obligated under White v. Regester and relevant lower court opinions to change its method of elections upon a bare showing of statistical under-representation of minorities. Where minority plaintiffs were able to secure remedial decrees, it was because they presented to the federal courts a detailed and egregious history of past intentional discrimination and the maintenance of electoral devices which perpetuated this discrimination. I am convinced that the proposed amendment to Section 2 contains a known, workable legal standard which clarifies the legislative intent of the Voting Rights Act to make it possible to continue the advances in equal voting rights which began with the enactment of the first modern civil rights act in 1957.

The requirement that plaintiffs prove public officials intended to discriminate as a condition for a voting rights violation injects a highly subjective, unreliable factor into judicial decision making.

The proposed bailout in S.1992 is entirely fair and would allow jurisdictions which have in fact had clean voting rights records to terminate Section 5 coverage. Those jurisdictions which do not have clean records, however, would remain covered by the pre-clearance provisions, a result, in my judgment, that is entirely equitable and consistent with the underlying purposes of the Fourteenth and Fifteenth Amendments.

As a Republican state Senator from Georgia, I am pleased publicly to support Senator Mattingly's co-sponsorship of this most important civil rights bill.

Sincerely,

PAUL D. COVERDELL
Senator, District Forty

cc: Senator Strom Thurmond (R-SC), Chair - Judiciary Committee
Senator Charles McC. Mathias (R-MD)
Senator Robert J. Dole (R-KS)
Senator Alan K. Simpson (R-WY)
Senator John P. East (R-NC)
Senator Charles E. Grassley (R-IA)
Senator Jeremiah Denton (R-AL)
Senator Arlen Spector (R-PA)
Senator Joseph R. Biden (D-DE)
Senator Edward M. Kennedy (D-MA)
Senator Robert C. Byrd (D-WV)
Senator howard M. Metzenbaum (D-OH)
Senator Dennis DeConcini (D-AZ)
Senator Patrick J. Leahy (D-VT)
Senator Max S. Baucus (D-MT)
Senator Howell Heflin (D-AL)
Senator Mack Mattingly (R-GA)
Mr. Frederick E. Cooper, Chairman, Republican Party of Georgia

Adopted by the General Board of Global Ministries, April 10, 1981

RESOLUTION

The Voting Rights Act

WHEREAS, the Voting Rights Act, a major tool of securing civil rights for minority groups, will expire in August, 1982, unless it is approved again by Congress;

WHEREAS, the Voting Rights Act has sharply increased registration and voting among minority groups, and helped increase the number of Black and Hispanic elected officials;

WHEREAS, the proposed legislation to continue the Voting Rights Act provides for the following:

- Voting assistance must be provided in languages other than English where there is a substantial number of citizens who could not vote effectively without such assistance;
- if certain state and local governments, who have had a past history of discriminatory voting procedures, seek to change voting or election procedures, they must first clear them with the Justice Department and show that the changes will not discriminate against minority voters - this prevents racial gerrymandering and other discriminatory techniques;
- in a court case where a person charges that he or she has been discriminated against by voting or election procedures, the person would only have to prove the procedure had a discriminatory effect on minority groups, instead of having the virtually impossible task of showing the discrimination was intentional.

WHEREAS, if the protections of the Voting Rights Act are terminated, there will he virtually no remedies for voting discrimination.

THEREFORE, BE IT RESOLVED,

1). That the General Board of Global Ministreis go on record as supporting renewal of the Voting Rights Act, and that the President of the Board communicate this support to the Regan Administration and to Congressional leadership;

2). That Directors of the General Board communicate with their Senators and Congresspersons (particularly those in the South and Southwest) urging them to vote for the renewal of the Voting Rights Act.

JUL 6 1981

MRS. DOROTHY FELTON
Representative, District 22
465 Tanacrest Drive, N.W.
Sandy Springs, Georgia 30328
Telephone: 404—252-4172
656-5056

House of Representatives

Atlanta, Georgia

COMMITTEES
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REAPPORTIONMENT
STATE PLANNING & COMMUNITY AFFAIRS
Area Planning & Development

July 1, 1981

The Honorable Strom Thurman
2222 Dirksen Building
Washington, D. C. 20510

Dear Senator Thurman:

As the Voting Rights Act is considered by the Senate Judiciary Committee I would appreciate your consideration of two items: (1) A broader definition be applied to "minority" and, (2) Language added that would prohibit a procedure and/or policy in the state legislature denying equality among elected state representatives and senators when local legislation is considered.

To explain the problem: There are 24 members of the House, 16 from Atlanta single-member districts and 5 from single-member districts in the Fulton County area outside Atlanta, with three elected county-wide.

"Rule 140A. If a majority of the members of the House whose districts are wholly or partially located within a political subdivision shall file with the Chairman of the State Planning and Community Affairs Committee their own rules as to the number of Representatives who must sign proposed legislation affecting that political subdivision before it will be favorably reported by the State Planning and Community Affairs Committee, the Committee shall observe such rules in considering such legislation. Otherwise, the Committee shall not favorably report any legislation affecting a political subdivision unless all of the Representatives whose districts are wholly or partially located within the political subdivision shall sign such legislation."

Rule 140 declares that a member may force a Committee to return a bill to the House for action after 10 days, but in practice, where a member of a county delegation attempts to force action by the House on a bill contrary to wishes of the majority of the local delegation, as that majority is defined in the rules filed with the State Planning and Community Affairs Committee, the Speaker invariably reminds the floor that this is local legislation, and if they disregard the local courtesy rule in one case, they will have to do so in all cases. The end result is that the floor always votes down the effort to take action contrary to the action of the local delegation majority. Even when the majority of the House members understand and want to vote on an issue that is a local bill.

The effect in Fulton County has been to give Atlanta a virtual veto over any local legislation proposed by those five representatives outside the City of Atlanta, for under Fulton County delegation rule, 2/3 of the delegation, or 16 members, control, and Atlanta has 16 members, plus the three delegates-at-large whose majority comes from Atlanta. In the Fulton delegation, there are 10 blacks and 14 whites. The ten blacks represent areas within Atlanta, there are six whites in the other Atlanta districts and the three at-large are whites.

The rule flies directly in the face of most conceptions of representative government. Under the State Constitution, the House of Representatives is "apportioned among representative districts of the state", Art. III, Sec. III, Par. I (S 2-901). Counties are not even recognized in the constitutional provisions governing the House of Representatives, and as held by the Supreme Court in the Georgia County Unit case,

> "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote - whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.
>
> * * * * * * * *
>
> The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing - one person, one vote." Gray V. Sanders, 372 U.S. 368, 379, 381, 9 L.Ed. 2d 821 (1963).

A strong argument can be made that the local courtesy rule dilutes the votes of persons in the five districts outside Atlanta by in effect giving the 16 representatives in Atlanta and three-at-large a veto over local legislation, which denies it even the right to be considered by the full house.

Also, in the famous Georgia two-governor case, Thompson V. Talmadge, 201 Ga. 867, 874, the Supreme Court of Georgia declared:

> "In the field of enacting laws general and broad power is given to the legislative department. If in the exercise of this power, which is unquestionably conferred upon it, the General Assembly merely fails to observe certain rules of internal procedure, the judiciary would not be authorized to review such action; and the same would be true as to any action of the officers of that body within the sphere of their jurisdiction."

Does the Constitution of the United States protect the citizens' from abuses that could (and in fact, does) occur from such a ruling?

A possible solution to (1) would be to add to the definition of minority to include "any identifiable group of people living in a compact or contiguous territory which has a resident population of 25,000 or more, according to the most recent United States decennial census, and a resident population density of at least 200 persons per square mile or an equivalent resident population density for measurements based on factors other than a square mile."

A possible solution to (2) would be to add language stating: The state legislature shall not establish procedures and/or policies denying any elected state representative or state senator the right to represent his district. So the one person, one vote concept is assured in the legislative process.

A possible solution to (1) would be to add to the definition of minority to include "any identifiable group of people living in a compact or contiguous territory which has a resident population of 25,000 or more, according to the most recent United States decennial census, and a resident population density of at least 200 persons per square mile or an equivalent resident population density for measurements based on factors other than a square mile."

A possible solution to (2) would be to add language stating: The state legislature shall not establish procedures and/or policies denying any elected state representative or state senator the right to represent his district, so the one person, one vote concept is assured in the legislative process.

Any consideration you can give us in solving this problem in Georgia shall be appreciated. There is no way for the five representatives who represent unincorporated Fulton County to force compromise. I am reminded of the John C. Calhoun statement, "Governments that are genuinely constitutional rest fundamentally upon compromise; absolute governments, whether ruled by one man or a numerical majority, rest ultimately upon the threat or the use of force."

Sincerely,

Mrs. Dorothy Felton

DF:aw

NETWORK 806 RHODE ISLAND AVENUE NE, WASHINGTON, DC 20018, (202) 526-4070

February 25, 1982

The Honorable Orrin Hatch
United States Senate
Washington, DC 20510

Dear Senator Hatch:

As the Senate hearings come to a close on the Voting Rights Extension Act, NETWORK would like to share our position with you and the committee.

We are, Senator, a Catholic social justice lobby with members throughout the country. The Voting Rights Extension is our priority domestic human rights issue. We recognize that the right to participate in public policy decisions is the hallmark of our democratic system of government, and that the ability to vote is key in actualizing that right.

We support S 1992 as the strongest Voting Rights Extension Bill before the Senate. Having followed the House deliberations as well as those in the Senate, we stand firm in believing that the bail-out provisions in S 1992 are strong, yes, but fair. We also believe that the Section 2 effects clause, with the specific disclaimer that proportional representation alone will not constitute a violation of this section, reflects both the original law's intent and its application prior to 1980.

We hope that the best and strongest Voting Rights Extension Bill will emerge from the committee. We believe it is S 1992 and urge serious consideration of this bill as you begin mark-up.

Sincerely,

Sister Nancy Sylvester, IHM

Sister Nancy Sylvester, IHM
NETWORK

A Catholic Social Justice Lobby

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN 2401 VIRGINIA AVE., N.W. / WASHINGTON, D.C. 20037
Phone 202/785-7700

VOTING RIGHTS ACT
(S. 1992)

The American Association of University Women, representing 190,000 college-educated women, urges you to affirm your commitment to voting rights for citizens, without regard to their race or national origin, by supporting reauthorization of the Voting Rights Act of 1965 without weakening amendments. In 1964 the AAUW worked for passage of the Civil Rights Act, and since that time members have supported not only the Voting Rights Act of 1965, but also subsequent voter registration legislation. At their recent Centennial Convention AAUW members reaffirmed their support for the elimination of discrimination based on sex, race, ethnic origin, creed, marital and socioeconomic status, age or disability.

The Voting Rights Act reauthorization bill, S. 1992, which was passed overwhelmingly by the House of Representatives, provides for extension of the Act's temporary provisions. Of particular importance among these provisions are:

- Section 2, which clarifies that any practice which "results" in a denial or abridgement of voting rights is prohibited.
- Section 3, which extends the requirement that certain states and counties provide bilingual election ballots.
- Section 5, which allows covered jurisdictions to bail out of the requirement that they "preclear", or obtain federal approval, before altering voting laws or procedures. This should provide an incentive for covered jurisdictions, either as entire states, or separately as counties, to take positive steps to ensure that voting rights are not abridged.

In addition to the temporary provisions of the Voting Rights Act there are also permanent provisions, such as the ban on discrimination in voting anywhere in the country and the ban on literacy tests, which will remain regardless of whether the special provisions are extended.

Ratified in 1870, the 15th Amendement to the U.S. Constitution declared it law that "the right of citizens to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Over 100 years later there remains a need for the U.S. Congress to assure citizens that their voting rights will not be abridged either in effect or by intent because of discrimination.

2/82

WOMAN'S NATIONAL DEMOCRATIC CLUB
POLITICAL ACTION COMMITTEE
1526 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036

March 9, 1982

The Honorable Orrin Hatch, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, D. C.

Dear Senator Hatch:

The Political Action Committee of the Woman's National Democratic Club adopted the following position in support of the extension of the Voting Rights Act of 1965.

> "THE POLITICAL ACTION COMMITTEE OF THE WOMAN'S NATIONAL DEMOCRATIC CLUB IS COMMITTED TO THE PROTECTION OF THE CONSTITUTIONAL RIGHTS OF ALL AMERICANS. IT IS, THEREFORE, STRONGLY SUPPORTING THE EXTENSION OF THE VOTING RIGHTS ACT WITHOUT WEAKENING AMENDMENTS."

The Voting Rights Act of 1965 is one of the most significant measures of civil rights legislation ever enacted, and the impact of the law on the lives of minority voters confirms the validity of the evaluation of the Act.

The passage and enforcement of the Act have been responsible for significant increases in the number of members of minorities registered and voting and the election of a large number of elected officials in the states and localities covered by the Act. Since its passage minority elected officials in the states and localities covered by the Act, as of July 1980, amounted to 2,042 persons in Federal, State and County offices. The extensive public support for the protection of the right to vote was reflected in the overwhelming vote of 389-24 in the House of Representatives.

The Administration, while in support of the extension of the Act, is opposed to some of the provisions of the House-passed bill. The Assistant Attorney General in charge of the Civil Rights Division, Mr. Reynolds, in testimony before the Subcommittee on the Constitution on March 1, 1982, stated that ".......Section 2 is loosely worded" and will lead to "..... proportional representation...". Other witnesses and some members of the Subcommittee pointed out that the present provisions of Section 2 did not lead to proportional representation and that the amendment in the House-passed bill was necessary to clarify Congressional intent because the Supreme Court argued in the Mobile case that the language in Section 2 as ambiguous.

WOMAN'S NATIONAL DEMOCRATIC CLUB
POLITICAL ACTION COMMITTEE
1526 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036

The Honorable Orrin Hatch
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March 9, 1982

Mr. Reynolds also testified to the effect that, ".....the Administration could support an amended bailout provision (different from the provision in the Housed-passed bill) that continues Section 5 preclearance,.....but at the same time provides a realistic and fair bailout mechanism.....". The House Report No.97-227 to accompany HR. 3112 states "The Committee believes .....the bailout provision set forth in H.R. 3112, as amended...is a reasonable bailout which will permit jurisdictions with a genuine record of nondiscrimination in voting to achieve exemption from the requirements of Section 5".

After careful review of the debate on the Voting Rights Act, the Political Action Committee of the Woman's National Democratic Club voted to support the House-passed bill without amendments. We strongly urge the Senate to enact speedily S1992 without amendments. With two-thirds of the members of the Senate supporting S.1992 we feel hopeful that it will be enacted before the present Act expires in August of this year.

We respectfully request that this letter be made a part of the record of hearings.

Sincerely,

Jeannette Wedel

Jeannette Wedel, Chair
Political Action Committee

NATIONAL FEDERATION OF THE BLIND
1800 JOHNSON STREET
BALTIMORE, MARYLAND 21230

KENNETH JERNIGAN, President

January 7, 1982

Mr. Stephen J. Markman
General Counsel
Senate Committee on the Judiciary
Subcommittee on the Constitution
Room 108
Russell Senate Office Building
Washington, DC 20510

Dear Mr. Markman:

I am writing in further reference to our interest in S. 895, the Voting Rights Extension Bill. Under date of October 23, 1981, I wrote to Senator Hatch, requesting an opportunity to testify during your Subcommittee's hearings on the Voting Rights Bill. Not having a response to this letter by January 5, and knowing that the Subcommittee would soon commence the hearings, I called to learn if a date had been scheduled for our testimony. It was at this point that Claire Greif advised me to prepare a written statement for the record and to write to you further concerning a personal appearance before the Subcommittee.

The National Federation of the Blind is a nationwide membership organization of blind people. Our membership is over 50,000. We have state affiliates and local chapters throughout the United States. Because of a House-passed amendment to the Voting Rights Act and for other reasons unrelated to this amendment, we have a substantial interest in voting rights legislation as it relates to eradicating election and voter registration policies which discriminate against the blind. In its present form, the Voting Rights Act does not speak to these problems, but it should be amended to do so.

Historically, state and local election laws have made some provision for assisting persons who are not able to mark paper ballots or use voting machines independently. The principal class of individuals for whom these policies are intended has been the blind. The most common form of the rule for providing such assistance is to require that supervising officials, or election judges from each political party at each polling place observe and assist blind persons in casting their votes. Thus, the ritual is that, upon arriving at the polling place, a blind voter is escorted into the booth by at least two election judges (one from each party) in order that both may witness the vote and assist the blind person in the physical act of casting it. This, as I say, has been a fairly common experience for blind people in most parts of our country.

Sometime in the mid-1960's (exactly when, I cannot be sure) a few states and local jurisdictions began receiving protests from the blind who saw this practice of supervised voting as a denial of the right to cast a secret ballot. As a result, many jurisdictions were persuaded to change their laws so as to provide that a blind voter needing assistance would have the option of taking an individual of his or her own choosing into the booth. This might be a family member, a friend, or a mere acquaintance on the street, but the important principle of free choice was written into the law. Under these circumstances, where the freedom of choice rule is in effect, election officials do not witness the vote cast by a blind voter with a freely chosen sighted assistant.

The change in this voting procedure has had dramatic consequences wherever it has been put into effect. For one thing, there are fewer confrontations between blind voters and election officials, since many blind people (just as sighted people would) resent having a total stranger look on while they are voting. Furthermore, many blind people report staying away from the polls entirely unless they are entitled to designate their own assistants. These points strike at the heart of the purpose behind the Federal Voting Rights Law, and in our opinion it is time to extend the Act's protection to blind persons who are commonly discriminated against in the manner which I have indicated.

The legislative remedy which we suggest would take the form of an amendment to the Voting Rights Act of 1965. A proposed amendment is attached. The amendment adds a section entitled "Rights of Blind and Others with Limited Vision" to Title II ("Supplemental Provisions") of the Voting Rights Act of 1965. Adopting this amendment would add a new Section 204 to the Act and redesignate the present Sections 204 through 207 as 205 through 208, respectively.

If enacted, the amendment would require states and political subdivisions to have procedures which will allow blind and visually limited citizens to register and vote under alternative methods. The purpose of the amendment is to place alternative methods of voting for the blind on a firm, legal foundation. While states and political subdivisions are given discretion in fashioning alternative procedures, any person who requires assistance because of blindnesss or a visual limitation is entitled to choose the assistant and to vote in privacy with the aid of such assistant. Moreover, there is a requirement that voter information and materials produced by any state or political subdivision for the benefit of the general public be available in alternative forms designed for persons unable to read such materials which are published in ink print. This requirement, too, has built-in flexibility, providing room for local option in determining the types of materials to be transcribed and the forms of such transcriptions. We believe that more specific mandates than those contained in this amendment would be unnecessarily rigid and undesirable.

We hope Senator Hatch will take an active interest in our amendment. Beyond the specific provisions outlined above, the amendment has the general value of underscoring the voting rights of blind citizens and others who have visual limitations to the extent that they find it necessary to vote by means of an alternative method. We believe it is important for Congress to take this step on behalf of these citizens, since many of them tend to remain away from the polls in fear of having difficulty with the mechanics of casting a ballot. Others are concerned about having their votes witnessed by election authorities, and still others are apprehensive about the possibility of confrontations with election officials when they insist upon naming a personal assistant. We believe that this amendment will substantially eliminate the voting problems faced by the blind and alleviate many of the worries about participating in the electoral process which have existed among this population.

It is the position of the National Federation of the Blind that the Senate should act favorably on the alternative voting methods amendment during the upcoming consideration of the voting rights extension bill. The importance of this is underscored by a House-passed provision in H.R. 3112, referred to as the "Fenwick Amendment." The Fenwick Amendment, adopted on the House floor, is intended to foreclose the possibility that voters might be observed and thereby intimidated by election officials. Mrs. Fenwick had the forethought to provide for the possibility that some voters (the blind included) might want assistance, so her amendment permits such voters to be accompanied in the booth.

The Fenwick Amendment does not seek to remedy the voting problems experienced by the blind, yet, from a technical point of view, it can be a ready-made foundation for building substantive law to assure all blind persons the right to vote by means of alternative methods. The point should be underlined that the Fenwick Amendment does not provide affirmatively for these alternative methods, nor does it foreclose the possibility of blind persons being assisted.

This is precisely where a Senate amendment must be targeted. Whereas the Fenwick Amendment would only "permit" assistance for the blind, the Senate amendment we are suggesting would "direct" every state and political subdivision to provide for alternative methods of voting by the blind and would further spell out some minimum requirements.

Standing alone, as it does now in the House-passed bill, the Fenwick Amendment gives us cause for grave concern. Our experience is that strange things begin to happen when uninformed election officials are turned loose to follow a general directive such as that contained in the Fenwick Amendment. We can easily predict, for example, an interpretation that the Fenwick Amendment requires election officials to protect the blind from unsuspecting manipulation by an assistant in the polling booth. This interpretation would not be far-fetched in view of the purpose of the Fenwick Amendment; hence, the "protection" of the blind would likely take the form of extreme custodialism. The Fenwick Amendment thus raises the possibility that election judges will be encouraged to observe blind voters for the ill-conceived purpose of protecting them. We see nothing in the amendment to prevent this.

The attached amendment to be offered in the Senate would avert the threat posed by the Fenwick Amendment by adopting an affirmative posture to require alternative methods of voting. In fact, this is a logical extension of the Fenwick Amendment, itself. It is inconceivable that the dangers of the Fenwick Amendment can be overcome by clarifying report language or by a colloquy on the Senate floor. This is not merely a matter of correcting the record. It is a matter of enacting substantive law which can help to avoid any confusion later in the courts.

Our purpose in testifying before the Subcommittee would be to impress upon the members the need for Senate action to avert the threat of the Fenwick Amendment and provide a substantive right for the blind to vote by means of alternative methods. In view of this purpose I am not comfortable with the idea of merely submitting a statement for the record. No doubt you will have hundreds of organizations requesting to testify on the Voting Rights Bill; yet, a lot of them will be saying exactly the same thing -- extend the Voting Rights Act provisions which will otherwise expire. The National Federation of the Blind will have a different message -- we favor adding additional coverage in the Voting Rights Act, as described in this letter and in the attached amendment.

Please let me hear from you reasonably soon regarding the possibility of scheduling an appearance. I can be reached by telephone at 301-659-9314. You can be sure of our deepest appreciation for your cooperation in this matter and for your attention to the points which we feel should be made regarding voting rights for the blind.

Cordially yours,

James Gashel

James Gashel
Director of Governmental Affairs

JG:bam

Proposed amendment to S. 895, a bill to amend the Voting Rights Act of 1965 to extend certain provisions for an additional ten years, to extend certain other provisions for an additional seven years, and for other purposes.

At the end of the bill entitled the "Voting Rights Act of 1981," add the following new section:

Sec. 5 Title II of the Voting Rights Act of 1965 is amended as follows:

(1) redesignate Sections 204 through 207 as Sections 205 through 208, respectively.

(2) amend Section 204, which, pursuant to subsection (1) of this section is redesignated as Section 205, by striking "or" after "Section 202," and inserting after "203," the following: "or 204."

(3) Such title is further amended by adding, after Section 203, the following new section:

Rights of Blind and Others with Limited Vision

Section 204(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of blindness or a visual limitation to the extent that such citizen requires an alternative method of voting.

(b) Each state and political subdivision shall establish procedures which provide alternative methods of voting for any citizen who, on account of blindness or a visual limitation is unable to complete printed voter registration forms, to read and mark printed ballots, or to use voting machines. Such procedures shall insure, at a minimum, that such citizen who requires an alternative method of voting may designate another person to act as an assistant solely for the purposes of performing visual and physical functions necessary to complete voter registration materials, to cast a ballot, and otherwise to read aloud any printed information provided to all other voters. Whenever a citizen designates a person to act as an assistant under the procedures of any state or political subdivision, such citizen and the assistant so designated shall be entitled to all of the rights of privacy accorded to all other voters by such state or political subdivision. The procedures established pursuant to this subsection may also provide other alternative methods which may include adapted voting machines or other modified voting procedures.

(c) Procedures for alternative methods of voting which are established pursuant to subsection (b) of this section shall also include methods for providing voter information and materials in forms alternative to the print media for citizens who are blind or of limited vision. Such alternative voter information and materials may include Braille or voice-recorded transcriptions of election laws and procedures, and voter registration information, and may also include Braille and recorded samples of registration forms and sample ballots, which shall contain all of the information published in the printed materials from which such samples are transcribed.

UFCW

United Food & Commercial Workers
International Union, AFL-CIO & CLC
1775 K Street, N.W.
Washington, D.C. 20006
(202) 223-3111

STATEMENT BY WILLIAM H. WYNN

INTERNATIONAL PRESIDENT

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (AFL-CIO)

TO THE CONSTITUTION SUBCOMMITTEE

OF THE JUDICIARY COMMITTEE OF THE U.S. SENATE

My name is William H. Wynn. I am the International President of the United Food and Commercial Workers International Union (AFL-CIO).

The UFCW is a labor union with 1.3 million members organized in some 700 local unions throughout the United States and Canada. The UFCW and its local unions have collective bargaining agreements with tens of thousands of employers throughout the food processing, retail sales, leather, health, commercial, shoe, fur and other industries.

UFCW strongly supports extension of the Voting Right Act. And we support S. 1992, a strong version of the law which ensures for all Americans the right to share in their government.

There is almost universal agreement, among foes and friends of the law alike, that the Voting Rights Act is the most effective civil rights law to emerge from the legislative and social activism of the 1960s. The figures tell the story.

In 1964, the year before initial passage of the act, 2.8 million blacks in 11 Southern states were registered to vote. Today, 4.2 million blacks are registered in those same states. Hispanic registration has increased by 30 percent nationwide and by 44 percent in the Southwest. Millions of disadvantaged whites have been enfranchized by the striking down of literacy tests and poll taxes.

The success of the Voting Rights Act is a proud chapter in this country's long struggle toward political equality. The right to vote --to choose our elected leaders and so to have some say in the policies by which we are governed-- is central to that struggle. It always has been.

Progress has not always been rapid or even steady. But the direction has been clearly to broaden the franchise, not to limit it. More than a century ago, property ownership was discarded as a prerequisite for voting. After another 100 years and an 80 year struggle, suffrage was extended to women. Still later, we began to beat down the barriers which historically have kept blacks and other minorities from the voting booth.

That effort culminated in passage of the Voting Rights Act in 1965. The nation's commitment to political equality was reaffirmed when the act was extended in 1970. In 1974, we lowered the voting age to 18. The next year, the Voting Rights Act was extended again.

It is a tragedy that the United States Senate is even considering weakening this legislation. It is tragedy compounded that the Reagan Administration is abetting the efforts to dilute the law's strength. It is also puzzling behavior from a President who correctly has said, "The right to vote is the crown jewel of American liberties and we will not see its luster diminished."

Why, then, this eleventh hour effort to tarnish it? And tarnished that "crown jewel" will certainly be if the Administration should prevail in its attempt to impose an "intent" standard and/or to weaken the bail-out provisions devised by the House in its admirable compromise on Section Five.

If the President had supported extension a year ago, it could very well be law by now. But there was no word from Attorney General William French Smith even though there were House hearings on the subject last year. He waited until January to charge at a Senate hearing that the House bill would allow proof of a violation "on no more than a finding of disproportionate election results."

Has the Attorney General read the House bill? Has the President? One is forced to conclude that they have not. It plainly states in Section 2: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation.

More in sorrow than in anger, I suggest that the issue of "disproportionate election results" is a red herring in the context of the voting right debate. It is simply not relevant.

The issue --the only issue-- is whether the rights of a citizen or citizens have been denied. It doesn't matter whether the denial was intentional or unintentional. It is patently absurd to argue, as the Administration does, that a law which curtails the rights of large numbers of citizens should be left standing because it cannot be proven that curtailment was intended. Unintentional murder may be manslaughter, but it is still a crime.

In Mobile vs. Bolden, the Supreme Court held that the intent of the at-large election system in Mobile, Alabama, was not discriminatory --or at least the plaintiff had not proven that it was. The election system in question dates back to 1911. How was the plaintiff to prove its intent? Distribute subpoenas in the cemetery? Hire a medium?

The idea is ludicrous. The fact is that racial gerrymandering, at-large elections which dilute minority voting strength in areas of neighborhood segregation, and hindrances to registration still exist in many states. In many of them they have existed for decades. Deliberate intent to discriminate would be impossible to prove, no matter how clear the discriminatory effects.

The government of the United States should not be in the business of making it more difficult to eliminate inequities at the polls. The House recognized that fact when it overwhelmingly passed, by a vote of 389 to 24, a bill which eliminates the element of intent. Sixty five Senators have signed on as sponsors of an identical bill in the Senate.

They recognize that the right to vote is not a partisan matter. All the President needs to do to avoid yet another civil rights blunder is to get his Administration out of the way and stop muddying the waters.

Thomas Jefferson said, "I know of no safe depository of the ultimate powers of the society but the people themselves." Passage of the House version of the extension of the Voting Rights Act is absolutely essential if all of the people are to be that "safe depository."

I strongly urge that this Subcommittee, the Senate Judiciary Committee and the whole Senate approve S. 1992 without amendment.

# # #

STATEMENT BY RAYMOND NATHAN, DIRECTOR,
WASHINGTON ETHICAL ACTION OFFICE,
AMERICAN ETHICAL UNION, ON S. 1992

The American Ethical Union is a national religious federation of 20 Ethical Societies plus members at large. During the 105 years of the Ethical movement we have stressed the worth of the individual, regardless of color. In keeping with this philosophy, we have supported civil rights legislation which enables every person to achieve his or her potential.

The Voting Rights Act of 1965 was an important step in this direction. We now must continue the progress made under its aegis by passing S. 1992 without weakening amendments.

Voter registration of minorities in the covered states has gone from 29 percent to over 50 percent in the last 17 years, according to The Washington Post of January 26, 1982. The same source says that the number of black elected officials in these states has increased from 158 to 1,813 in the last 12 years.

The overwhelming majority of Americans believe this is a healthy trend, and their sentiments were reflected in the House of Representatives' massive vote for H.R. 3112, to which S. 1992 is identical.

Argument over S. 1992 seems to revolve around two issues. The first is the question of "bail-out." We believe the bill's provisions are generous in this respect. Unless a county or state insists on continuing discrimination, it can achieve exemption from the pre-clearance requirements in as few as two years, and at most in ten.

The other argument relates to jurisdictions not covered by the preclearance obligation of Section 5. If the Attorney General or private plaintiffs wish to challenge a discriminatory practice in such places, they must sue under Section 2. Section 2 provides that:

"No voting qualifications or prerequisites to voting or standard or practice or procedures shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States on account of race or color."

S. 1992 would make clear that any practice which results in such denial or abridgement is prohibited, and parties suing would need to show discriminatory results in light of all the circumstances. Claims that this results test would make at-large elections automatically vulnerable to suit are unfounded, since S. 1992 specifically states that "the fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation."

The language emphasizing "results" rather than "intent" is consistent with the intent of Congress in passing the Voting Rights Act. Attorney General Katzenbach, who had a major role in drafting the Act, testified that he understood the word "procedure" in Section 2 "as including any kind of practice...if its purpose or effect was to deny or abridge the right to vote on account of race or color."

An "intent" standard would make enforcement under Section 2 virtually impossible. Many jurisdictions do not maintain a legislative history, and the individual involved in passing the legislation may now be dead.

We oppose any attempts by Congress to overrule specific Supreme Court decisions interpreting the Constitution, but we do not believe that the language of Section 2 in S. 1992 is such an attempt. It is not in the nature of a Congressional definition of what violates the 15th Amendment, but rather a separate, additional statutory protection. The Supreme Court reaffirmed that Congressional power in Rome, Georgia v. U.S. on the very day that it held in Mobile v. Bolden that litigation under the 15th Amendment itself requires proof of intent.

With the nation in the throes of economic changes which have severe impact on the lives of minority citizens, passage of S.1992 as written would be a signal that they are welcome participants in the political process. Gutting the bill would tell them that they are condemned to be "outsiders," and would play into the hands of extremists. We urge passage of S. 1992 as the only rational and moral choice.

1912

BRUCE BABBITT
GOVERNOR

OFFICE OF THE GOVERNOR
STATE HOUSE
PHOENIX, ARIZONA 85007

IN REPLY
REFER TO:

July 16, 1981

Honorable Orrin G. Hatch
411 Russell Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

I am the Governor of one of the States completely covered by the "preclearance" requirements of the Voting Rights Act. It is fashionable for Governors to plead with the Congress to remove federal oversight of State activities; on many occasions I have made precisely such requests. Today, however, I urge a very different proposal -- the unequivocal extension of the provisions of the Voting Rights Act.

The Voting Rights Act has been the single most effective tool for implementing the promise of the Fifteenth Amendment that the right to vote shall not be denied on the basis of race or color. When the Act was signed, only 16 years ago, millions of American citizens were disenfranchised, sometimes through such mechanisms as the poll tax and literacy tests, but often simply through flat denial by racist authorities of the right to vote. Today, even in those portions of the country where blatant discrimination was once the rule, the Constitution's promise of universal voting is being fulfilled.

Opponents of the Act in 1965 openly proclaimed white supremacy as their rationale. Today, the opposition is more subtle. We are told that the time has come to let the South out of "the penalty box." Citing the undeniable progress that has been made since 1965, opponents of extension claim that the States should now be freed of overbearing federal supervision. Others, in a ploy, Representative Hyde aptly characterized as designed to "strengthen the Act to death," argue that it should be extended to all 50 States.

Whatever the motivation of those who oppose the Act's extension, the inevitable result of such Congressional abdication will be the denial of rights of the black, the brown, and the poor. While the past 16 years have seen the demise of the poll tax and the literacy test, those who would deny proper representation to Hispanics or blacks have not been without new tactics. The police dog and the billy club have been replaced by artful reapportionment and manipulation of registration laws. In instance after instance, the Justice Department has stepped in to prevent States from diluting minority votes by gerrymandering the redrawing of voting lines. These tactics, to be sure, are less dramatic than the violence of the early 1960's. They are, however, no less effective, and it is the duty of those who take an oath to uphold the Constitution to make certain that they cease.

There remains much to be done to achieve racial justice both in Arizona and throughout the Nation, and the Voting Rights Act is a critical tool in that battle. I urge the Congress to extend its provisions.

Sincerely,

Bruce Babbitt
Governor

BB:keh

State of South Carolina

Office of the Governor

RICHARD W. RILEY
GOVERNOR

POST OFFICE BOX 11450
COLUMBIA 29211

January 27, 1982

The Honorable Orrin G. Hatch
Russell Building - Room 411
Washington, D.C. 20510

Dear Senator Hatch:

In 1940, three thousand black citizens in South Carolina were registered to vote; today that figure stands at over 323,000.

Between the days following Reconstruction and the advent of the 1965 Voting Rights Act, one black citizen held elective office in our state; today blacks hold 15 seats in our House of Representatives and 58 significant county offices.

Should we now abandon this landmark of liberty? Should we pat ourselves on the back for a job well done?

I think not.

That we have achieved great strides is without question; that we have met the task of eradicating the blight of discrimination from our election process is just not true.

I, therefore, wish to add my voice to the chorus of citizens, public and private, who believe that the United States Senate should immediately adopt the Voting Rights Bill as passed by the U.S. House of Representatives.

Like many others, last year, I felt that the nationwide extension of this Act should be explored. I did so based upon the belief that the right to vote is the most basic and cherished right that an American possesses and, therefore, every effort should be made to safeguard that right no matter where an individual happens to reside. I continue to believe this. But, I am also convinced that nationwide application of this law at this time would seriously weaken rather than strengthen this law.

Currently, at the Justice Department's Civil Rights Division, a staff of 16 reviews changes in the laws of the 7,296 cities, towns, counties and states covered by the Act. They work with the 19 division attorneys who have responsibility for all voting rights violations.

With the economic uncertainty and the federal deficit already out of control, it would be unrealistic to believe that adequate and effective review of nationwide preclearance could be achieved.

In addition, I am satisfied that the so called "bail out" provision in the House bill is fair and will permit law abiding states, counties and cities to escape permanent coverage under the law.

Chapter and verse of positive statistics and cultural, political and social benefits can be cited as a result of the Voting Rights Act. I will not recite them to you as most of you are aware of those benefits.

However, there remains an important argument for passage of this Bill that I believe should be aired. It has to do with symbolism.

In a time of record unemployment in our country, the unemployment figure among minorities is two and a half times that of the nation. In a time when our government is cutting back on and into the social safety net of our nation's poor, a very large portion of those poor people are black or hispanic or native Americans. Failure to pass this Voting Rights Bill will send the wrong signal at the wrong time to too many Americans.

In the end, there is only one criterion by which this Bill should be judged and that is whether or not it effectively guards the right of but one citizen's vote. If it does that then it guards the life of this nation.

I am taking the liberty of forwarding this letter to each member of the Judiciary Committee and respectfully ask that you take whatever actions are necessary and appropriate to make these recommendations known to the members of your subcommittee.

Thank you in advance for your consideration.

Yours sincerely,

Richard W. Riley

Richard W. Riley

RWR/iws

National Council of Women
OF THE UNITED STATES, INC.
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April 26, 1982

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DOROTHEA HOPFER
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SHIRLEY MUNYAN
BETTY OBIAJULU
ALICIA PAOLOZZI
BETKA PAPANEK
ETHEL PHILLIPS
HOPE SKILLMAN SCHARY
MARGOT SHERMAN
BARBARA SMITH

EXECUTIVE DIRECTOR

MERRINELLE SULLIVAN

Senator Orrin G. Hatch
Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch,

Re: Extension of the Voting Rights Act as passed by the House of Representatives

The Executive Committee of the National Council of Women of the United States, representing 25 women's organizations and a constituency of millions of men and women, asks that you vote to pass the vital Voting Rights Act without amendments.

- We agree that the right to vote is the basis of a free society. All citizens are entitled to that right.
- We ask for the extension of the Voting Rights Act.
- We urge you to vote for the bill passed by the House of Representatives incorporating an "effects" test. We are opposed to an "intent" test which is virtually impossible to prove.
- We urge you to support an Act which may be effectively enforced. The Act passed by the House of Representatives will most surely ensure voting rights.

We respectfully request that you put the full force of your position and your authority behind the House of Representatives' version of the Voting Rights Extension Act.

With appreciation for your careful consideration and your thoughtful action.

Yours faithfully,

Lois McLaughlin

Lois Ingalls McLaughlin
President

PART 3. MISCELLANEOUS STUDIES AND ANALYSIS

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General
Washington, D.C. 20530

February 25, 1982

Honorable Strom Thurmond
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

A number of the Senators with whom the Attorney General, Brad Reynolds and I have met regarding the extension of the Voting Rights Act have requested further information on the statutory and case law regarding multi-member election districts. I have just forwarded to these Senators the enclosed memorandum on that study setting out the law prior to City of Mobile v. Bolden (Attachment A). I have also enclosed a reprint of The Washington Post's April 28, 1980 editorial "The Mobile Decision" (Attachment B). I think that you will find that editorial quite interesting and relevant.

Finally, we have forwarded the enclosed Attachment C for their reference. This attachment includes a short memorandum on "Why Section 2 of the Voting Rights Act Should be Retained Unchanged," a copy of two letters to the editor recently printed in the New York Times, a reprint of Assistant Attorney General Brad Reynolds' letter-to-the editor of The Washington Post and a reprint of the editorial from January 19, 1982, of the Wall Street Journal.

I thought that these items would be of interest to you.

Sincerely,

Bob McConnell

Robert A. McConnell
Assistant Attorney General

Attachments

. ATTACHMENT "A"

STATUTORY AND CASE LAW REGARDING MULTI-MEMBER ELECTION DISTRICTS

Prior to the decision in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), Sec. 2 of the Voting Rights Act did not play a major role in cases charging that multi-member electoral districts discriminated on account of race. The United States relied on Sec. 2 to give it authority to sue (see, *e.g.*, *United States* v. *Uvalde Consol. I.S.D.*, 625 F.2d 547 (5th Cir. 1980), *cert. denied*, 451 U.S. 1002 (1981), and private plaintiffs coupled Sec. 2 claims with claims of unconstitutional discrimination. But no court has ever relied on Sec. 2 as a ground for relief against multi-member districts. 1/

1/ Of the few appellate court opinions which address claims under Sec. 2 of the Voting Rights Act, only three antedate the Supreme Court's decision in *Mobile*. One was the Fifth Circuit's decision in *Mobile*, 571 F.2d 238, 242 n.3 (5th Cir. 1978) (the plaintiffs' Sec. 2 claim "was at best problematic; this court knows of no successful dilution claim expressly founded on [Sec. 2]"). Neither of the others was a dilution case. *Toney* v. *White*, 476 F.2d 203, 207, modified and aff'd *en banc*, 488 F.2d 310 (5th Cir. 1973), involved relief based on an official's purge of blacks from the voter rolls, conduct held to violate both Sec. 2 and the Fifteenth Amendment. *United States* v. *St. Landry Parish School Board*, 601 F.2d 859, 865-866 (5th Cir. 1979), pertained to a vote-buying scheme involving black voters. Other decisions in suits based in part upon Sec. 2 did not discuss Sec. 2. *Coalition for Education in Dist. 1* v. *Board of Elections*, 495 F.2d 1090 (2d Cir. 1974) (successful challenge by minority race voters to school board election in New York City); *Black Voters* v. *McDonough*, 565 F.2d 1 (1st Cir. 1977) (unsuccessful challenge to at-large system for electing the Boston School Committee); and *United States* v. *East Baton Rouge Parish School Board*, 594 F.2d 56 (5th Cir. 1979) (reversing the dismissal of suit attacking the use of multi-member wards).

Four post-*Mobile* Fifth Circuit cases discuss the application of Sec. 2 to dilution claims. *United States* v. *Uvalde Consol. I.S.D.*, 625 F.2d 547 (5th Cir. 1980), cert. denied, 451 U.S. 1002 (1981). (United States' authority under Sec. 2 to challenge discriminatory multi-member school board electoral system); *McMillan* v. *Escambia County*, 638 F.2d 1239, 1242, n.8, 1243 n.9 (5th Cir. 1981), appeal pending (Sec. 2 and the Fifteenth Amendment do not cover vote dilution); *Lodge* v. *Buxton*, 639 F.2d 1358, 1364 n.11 (5th Cir. 1981), prob. juris. noted sub nom. *Rogers* v. *Lodge*, 50 U.S.L.W. (U.S. Oct. 5, 1981) (*Mobile* establishes that Sec. 2 does not provide a remedy for conduct that does not violate the Fifteenth Amendment); *Kirksey* v. *City of Jackson*, 663 F.2d 659, 664-665 (5th Cir. 1981) (rejecting assertion that Sec. 2 goes beyond the Fifteenth Amendment and prohibits practices that perpetuate the effexts of past discrimination). See also n.6, *infra*.

occasions to "the impact" of the practices, but nowhere does the opinion intimate that impact alone was enough. Rather, the Court examined impact as one of several pieces of circumstantial evidence of "invidious discrimination." 3/

Thus, although Washington v. Davis, 426 U.S. 229 (1976) is often cited as the genesis of the purpose test in racial discrimination cases brought under the Constitution, Washington simply is a continuation of a settled line of Supreme Court decisions. Indeed, Washington relies not only upon cases involving purposeful discrimination in schools and jury selection, but also on Wright v. Rockefeller, 376 U.S. 52 (1964), in which the Supreme Court had applied a purpose standard to a claim of racial discrimination in drawing legislative district lines. While Washington expressly disapproved certain other cases which appeared to have relied solely on an effects test, it did not disapprove Whitcomb, White, or lower court cases which had followed them, for the simple reason that those cases did not embody an effects test.

The decisionmaking in the lower courts followed a similar course. The leading cases were decided in the Fifth Circuit. From 1973 to 1978 the controlling Fifth Circuit case was Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). 4/ Zimmer did not address Section 2. That case did, however, set out a series of evidentiary factors for determining whether a multimember district is unconstitutionally discriminatory under the rule of Whitcomb and White. While that opinion does exhibit some confusion as to whether purpose or effect or both are at issue (see, e.g., 485 F.2d at 1304 and n.16), the court stressed that "it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives." 485 F.2d at 1305. The court characterized the issue as whether the evidence shows unconstitutional "dilution" of the vote of minority members, thus sidestepping any debate about whether a purpose test or an effects test applies. 5/

3/ Justice White, himself, agreed in his dissenting opinion in Mobile that White v. Regester was a case in which indirect evidence supported an "inference of purposeful discrimination." 446 U.S. at 103. He simply disagreed with the Mobile plurality's assessment of the evidence regarding purpose in Mobile.

4/ The affirmance was without consideration of the constitutional issue.

5/ The court borrowed most of the "Zimmer" factors from Whitcomb and White. The court said:

> * * * where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of

Thus, it is clear that the controversy over *Mobile* does not relate to enforcement of Sec. 2, but instead concerns whether *Mobile* has radically altered the pre-existing case law under the Fourteenth and Fifteenth Amendments. The Supreme Court's first review of the contention that multi-member districts discriminated against blacks was in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). There the district court had struck down the legislative multimember district in Marion County, Indiana, because it found the scheme had a discriminatory effect. 2/ However, the Supreme Court reversed, holding that there is no right to proportional representation and noting that there was no suggestion that the multimember districts in Indiana "were conceived or operated as purposeful devices to further racial or economic discrimination." *Id.* at 149. The Court discussed at length various ways of proving intentional discrimination, including discrimination in voter registration and exclusion from party slates. Thus, *Whitcomb* (a) rejected the effects test; (b) applied the purpose test; and (c) gave some guidance as to the proof necessary to sustain a constitutional challenge to at-large elections.

The only other pre-*Mobile* Supreme Court decision directly on the subject is *White* v. *Regester*, 412 U.S. 755 (1973), in which the Court upheld a finding that multi-member districts in Bexar and Dallas Counties, Texas, unconstitutionally discriminated on account of race and national origin. While the case has been pointed to as embracing an effects test, the Court explicitly began its analysis by emphasizing that "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential." 412 U.S. at 765-766. As to Dallas County, the Court held that the district court findings of a history of official discrimination against blacks, the use of electoral devices which enhanced the opportunity for racial discrimination, the discriminatory exclusion of blacks from party states, and the use of anti-black campaign tactactics demonstrated a violation of the rule of *Whitcomb* v. *Chavis*. 412 U.S. at 766-767. As to Bexar County the Court again found "the totality of the circumstances" supported the district court's view "that the multi-member district, as designed and operated in Bexar County, invidiously excluded Mexican-Americans from effective participation in political life." 412 U.S. at 769. It is true that the opinion of Justice White, for the Court, refers on several

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2/ Specifically, the district court "thought [poor Negroes] unconstitutionally underrepresented because the proportion of legislators with residences in the ghetto elected from 1960 to 1968 was less than the proportion of the population, less than the proportion of legislators elected from Washington Township, a less populous district, and less than the ghetto would likely have elected had the county consisted of single-member districts." 403 U.S. at 148-149.

When the *Zimmer* rule was challenged by Mobile and other jurisdictions with multi-member districts, the Fifth Circuit thoroughly discussed the *Zimmer* factors in light of *Washington* v. *Davis*. In a companion case to *Mobile* the Fifth Circuit explained that:

> * * * *Washington* v. *Davis* * * * requires a showing of intentional discrimination in racially based voting dilution claims founded on the fourteenth amendment. We conclude also that the case law requires the same showing in fifteenth amendment dilution claims. Moreover, we demonstrate that the dilution cases of this circuit are consistent with our holding in this case. In particular, we read *Zimmer* as impliedly recognizing the essentiality of intent in dilution cases by establishing certain categories of circumstantial evidence of intentional discrimination.

Nevett v. *Sides*, 571 F.2d 209, 215 (1978), cert. denied, 446 U.S. 951 (1980). Based on these standards the Fifth Circuit held that the district court's findings in *Mobile* "compel the inference that the system has been maintained with the purpose of diluting the black vote, thus supplying the element of intent necessary to establish a violation of the fourteenth amendment." *Bolden* v. *City of Mobile*, 571 F.2d 238, 245 (5th Cir. 1978). 6/

Thus, when *Mobile* reached the Supreme Court both the Fifth Circuit and prior Supreme Court cases accepted the proposition that discriminatory intent is a necessary element of a claim that multi-member districts violate the Constitution. The plurality

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5/ (continued)

> legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistri of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in *White* v. *Regester*, *supra*, demonstrates, however, that all these factors need not be proved in order to obtain relief.

485 F.2d at 1305.

opinion of Justice Stewart in *Bolden* did not reject *Whitcomb* or *White*; indeed, it did not fully reject *Zimmer*. Rather, the plurality relied heavily on *Whitcomb* and *White* and argued that those decisions were consistent with *Washington* v. *Davis*. See, *e.g.*, 446 U.S. at 65-69. As to *Zimmer*, Justice Stewart thought that it reflected a misunderstanding that discriminatory effect alone violated the Fourteenth Amendment (*id.* at 71), but nonetheless agreed that "the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose." *Id.* at 73. However, Justice Stewart thought that the lower courts had treated the *Zimmer* criteria mechanically, failing to follow the approach of governing precedents 7/ to determining whether there was discriminatory intent. Further, the lower courts had failed to specify whose intent was at issue. However, it is important to note that Justice Stewart did not conclude that Mobile's multi-member system was nondiscriminatory, 8/ but merely sent the case back to the lower courts to reevaluate it pursuant to proper standards.

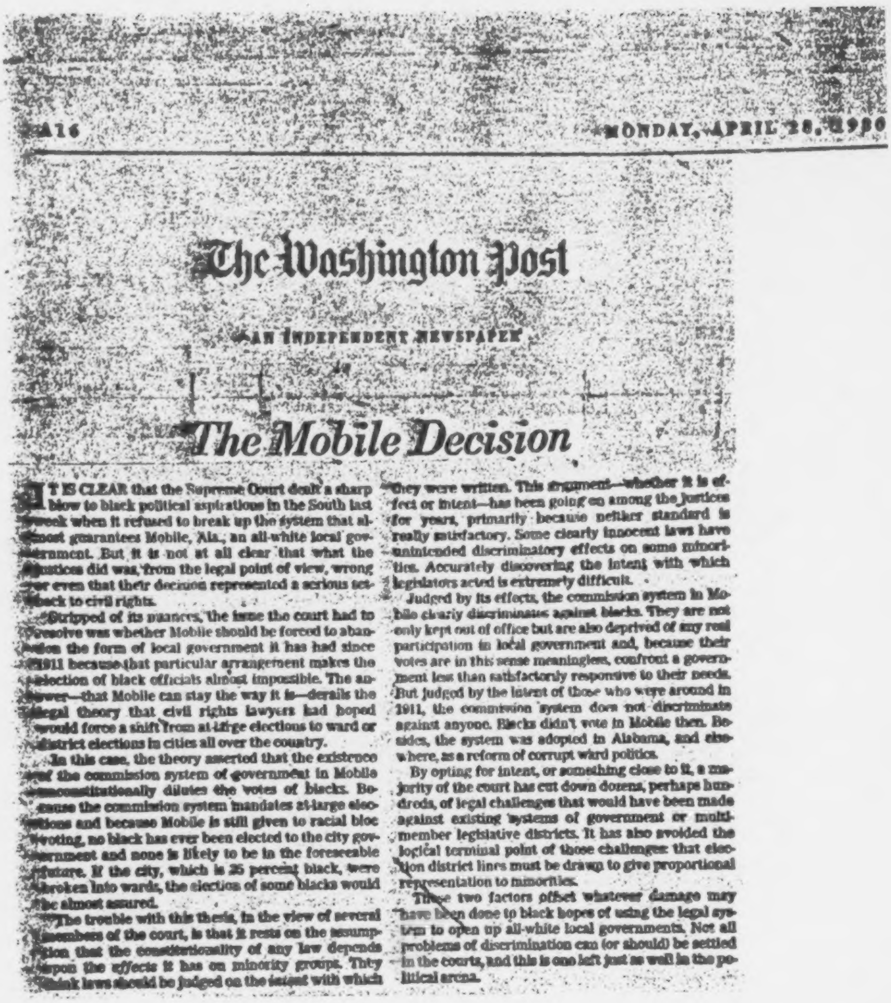
Mobile is not, therefore, a sharp departure from the case law of the past twenty years. It is an application of a consistent line of cases holding that, indirect evidence may make out a showing that, because of purposeful discrimnination, the adoption or maintenance of a multi-member district is unconstitutional. The issues in *Mobile* were what kind of indirect evidence and whose intent. We recognize that the *Mobile* case places a burden of proof on the plaintiff, but so did its predecessor cases. The burden is a manageable one, which does not require "smoking gun" evidence, but does require a sensitive and careful sorting of circumstantial evidence. In the *Mobile* case on remand the United States has argued that the evidence meets the standards articulated by Justice Stewart's plurality opinion.

6/ The court noted that it knew "of no successful dilution claim expressly founded on" Sec. 2 of the Voting Rights Act. 571 F.2d at 242 n.3.

7/ For example, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), had provided detailed guidance as to factors lower courts should consider in deciding whether governmental action had been taken with discriminatory intent.

8/ He said "[w]hether it may be possible ultimately to prove that Mobile's present governmental and electoral system has been retained for a racially discriminatory purpose, we are in no position now to say." 446 U.S. at 75, n.21.

ATTACHMENT (B"



A16 MONDAY, APRIL 28, 1980

The Washington Post

AN INDEPENDENT NEWSPAPER

The Mobile Decision

IT IS CLEAR that the Supreme Court dealt a sharp blow to black political aspirations in the South last week when it refused to break up the system that almost guarantees Mobile, Ala., an all-white local government. But it is not at all clear that what the justices did was, from the legal point of view, wrong or even that their decision represented a serious setback to civil rights.

Stripped of its nuances, the issue the court had to resolve was whether Mobile should be forced to abandon the form of local government it has had since 1911 because that particular arrangement makes the election of black officials almost impossible. The answer—that Mobile can stay the way it is—derails the legal theory that civil rights lawyers had hoped would force a shift from at-large elections to ward or district elections in cities all over the country.

In this case, the theory asserted that the existence of the commission system of government in Mobile unconstitutionally dilutes the votes of blacks. Because the commission system mandates at-large elections and because Mobile is still given to racial bloc voting, no black has ever been elected to the city government and none is likely to be in the foreseeable future. If the city, which is 25 percent black, were broken into wards, the election of some blacks would be almost assured.

The trouble with this thesis, in the view of several members of the court, is that it rests on the assumption that the constitutionality of any law depends upon the effects it has on minority groups. They think laws should be judged on the intent with which they were written. This argument—whether it is effect or intent—has been going on among the justices for years, primarily because neither standard is really satisfactory. Some clearly innocent laws have unintended discriminatory effects on some minorities. Accurately discovering the intent with which legislators acted is extremely difficult.

Judged by its effects, the commission system in Mobile clearly discriminates against blacks. They are not only kept out of office but are also deprived of any real participation in local government and, because their votes are in this sense meaningless, confront a government less than satisfactorily responsive to their needs. But judged by the intent of those who were around in 1911, the commission system does not discriminate against anyone. Blacks didn't vote in Mobile then. Besides, the system was adopted in Alabama, and elsewhere, as a reform of corrupt ward politics.

By opting for intent, or something close to it, a majority of the court has cut down dozens, perhaps hundreds, of legal challenges that would have been made against existing systems of government or multi-member legislative districts. It has also avoided the logical terminal point of those challenges: that election district lines must be drawn to give proportional representation to minorities.

These two factors offset whatever damage may have been done to black hopes of using the legal system to open up all-white local governments. Not all problems of discrimination can (or should) be settled in the courts, and this is one left just as well in the political arena.

ATTACHMENT "C"

WHY SECTION 2 OF THE VOTING RIGHTS ACT SHOULD BE RETAINED UNCHANGED

Section 2 of the Voting Rights Act of 1965 provides:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color [or membership in a language minority]."

This provision, which is an important part of what has been uniformly described as the most successful civil rights law ever enacted, is applicable nationwide. Unlike §5 of the Act, §2 is a permanent provision which does not expire in August, so no action is necessary to continue its protections. President Reagan, in endorsing extension of the preclearance provisions of §5, has also urged retention of §2 without any change.

The bill recently passed by the House, however, does not continue §2 unchanged, but rather amends that provision by striking out the phrase "to deny or abridge" and substituting the phrase "in a manner which results in denial or abridgement of". There are several reasons why this change is unacceptable.

1. Like other civil rights protections, such as the Fourteenth Amendment's equal protection guarantee, §2 in its historic form requires proof that the challenged voting law or procedure was designed to discriminate on account of race. This "intent test" follows logically and inexorably from the nature of the evil that §2 was designed to combat. Both the Fifteenth Amendment and §2, which implements the constitutional protection, establish this Nation's judgment that official actions in the area of voting ought not be taken on the basis of race. As the Supreme Court recently made clear in City of Mobile v. Bolden, 446 U.S. 55 (1980), decisions that are proved to have been made on that prohibited basis -- i.e., with the intent to affect voting rights because of race -- must fall.

The House bill would alter §2 dramatically by incorporating in that provision a so-called "effects test". Under the House bill, the inquiry would focus not on whether the challenged action was taken with discriminatory purpose, but rather on whether the "results" of an election adversely affect a protected group.

By measuring the statutory validity of a voting practice or procedure against election "results," the House-passed version of §2 would in essence establish a "right" in racial and language minorities to electoral representation proportional to their population in the community. Any election law or procedure that did not lead to election results which mirrored the population make-up of the particular jurisdiction could be struck down as being impermissibly "dilutive" or "retrogressive" -- based on court decisions under §5 of the current Act (which does include an "effects" test). Historic and common political systems incorporating at-large elections and multi-member districts would be vulnerable to attack. So, too, would redistricting and reapportionment plans, unless drawn to achieve election results reflecting the racial balance of the jurisdiction. The reach of amended §2 would not be limited to statewide legislative elections, but would apply as well to local elections, such as those to school boards and to city and county governments.

As Justice Stewart correctly noted in his opinion in City of Mobile v. Bolden, incorporation of an effects test in §2 would establish essentially a quota system for electoral politics by creating a right to proportional racial representation on elected governmental bodies. Such a result is fundamentally inconsistent with this Nation's history of popular sovereignty.

2. Proponents of the House bill attempt to counter this argument by citing a "savings clause" in §2, which provides that "the fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation" (emphasis supplied). By its terms, however, this provision removes from the §2 prohibition only those election systems that are neatly tailored to provide protected groups an opportunity to achieve proportional electoral success (i.e., single-member districts drawn to maximize minority voting strength). In circumstances where the racial group failed to take advantage of the political opportunity provided by such an election system (by refraining, for example, from running any candidates for office), the resulting disproportionate electoral representation would not, in such a situation, be fatal under the House bill, since that single consequence is not, "in and of itself," sufficient to make

out a violation. If, on the other hand, the challenged electoral system is not structured to permit proportional representation, (such as the common at-large and multi-member district election systems), the so-called savings clause is to no avail. The "results" test in §2 of the House bill would effectively mandate in such circumstances an electoral restructuring (even on a massive scale) so as to allow achievement of proportional representation if the particular racial or language group so desires.

3. Proponents of the amendment also claim that intent is virtually impossible to prove. This argument is simply false. The Supreme Court has made clear that intent in this area, like any other, may be proved by both direct and circumstantial evidence. A so-called "smoking gun" (in terms of actual expressions of discriminatory intent by members of the legislature) is simply not necessary. Plaintiffs can rely on the historical background of official actions, departures from normal practice, and other indirect evidence in proving intent. In this regard, the Voting Rights Act as currently written stands on the same footing as most other federal constitutional and statutory provisions in the civil rights area. Proof of wrongful intent as an element of the legislative offense is the rule -- not the exception. Adherence to that traditional standard in the present context is all the more compelling when one recalls that §2 is intended to be coextensive with the Fifteenth Amendment, which safeguards the right to vote only against purposeful or intentional discrimination on account of race or color.

Moreover, violations of §2 should not be made too easy to prove, since they provide a basis for the most intrusive interference imaginable by federal courts into state and local processes. The district court judge in the Mobile case, for example, acting solely on the basis of perceived discriminatory "effects", struck down the city's three-member, at large commission system of government, which had existed in Mobile for 70 years. In its place the federal judge ordered a mayoral system with a nine-member council elected from single-member districts. It would be difficult to conceive of a more drastic alteration of local governmental affairs, and under our federal system such an instrusion should not be too readily permitted.

4. Section 2 in its present form has been a successful tool in combatting racial discrimination in voting. The House in its hearings on extension of the Voting Rights Act failed to make the case to support a change in the existing "intent" standard. Significantly, no testimony was offered as to election practices in non-covered jurisdictions to

indicate a need to introduce a nationwide "results" test in §2. The House Report itself conceded that "no specific evidence of voting discrimination in areas outside those presently covered was presented." When Congress decided in 1965 to depart from the "intent" standard embedded in the Fifteenth Amendment and to adopt an "effects" test for §5 as a remedial measure for specifically identified covered jurisdictions, it based that legislation on a comprehensive congressional record of abuses of minority voting rights in those covered jurisdictions. In addition it applied the effects test only on a temporary basis and only to election law changes. The House bill seeks some seventeen years later to impose a similar "effects" standard nationwide on the strength of a record that is silent on the subject of voting abuses in non-covered jurisdictions. The House bill would also apply the effects test on a permanent basis and to existing election systems and practices as well as changes. Such an effort is not only constitutionally suspect, but also contrary to the most fundamental tenants of the legislative process on which the laws of this country are based.

The Washington Post

The Voting Rights Act Works As Is

By editorial comment ("Voting Rights: Be Strong," Jan. 26), The Post urged endorsement of the House-passed amendment to Section 2 of the Voting Rights Act, which changes the standard for determining a violation from the current "intent" test to one that requires only a showing of discriminatory "effect." Remarkably, the case made for this position was that the House bill merely seeks to reinstate the standard in use before the Supreme Court decision in *City of Mobile v. Bolden*.

In the 1980 *Mobile* decision, the Supreme Court considered Section 2 of the Voting Rights Act for the first time and concluded that proof of discriminatory "intent" *is* necessary to establish violations of that provision. Contrary to The Post's editorial, this decision signaled no change in the law.

The act itself is unambiguous on this point. As Justice Potter Stewart observed in *Mobile*, Section 2 was enacted to enforce the guaranty of the Fifteenth Amendment, and that constitutional provision has always required proof of discriminatory intent. Had Congress intended to include in Section 2 an "effects" test, it certainly knew how; in 1965, and again in 1970 and 1975, Congress explicitly included an "effects" test in Section 5 of the Voting Rights Act (applicable only to selected jurisdictions), but chose not to put the same standard in Section 2 (applicable nationwide).

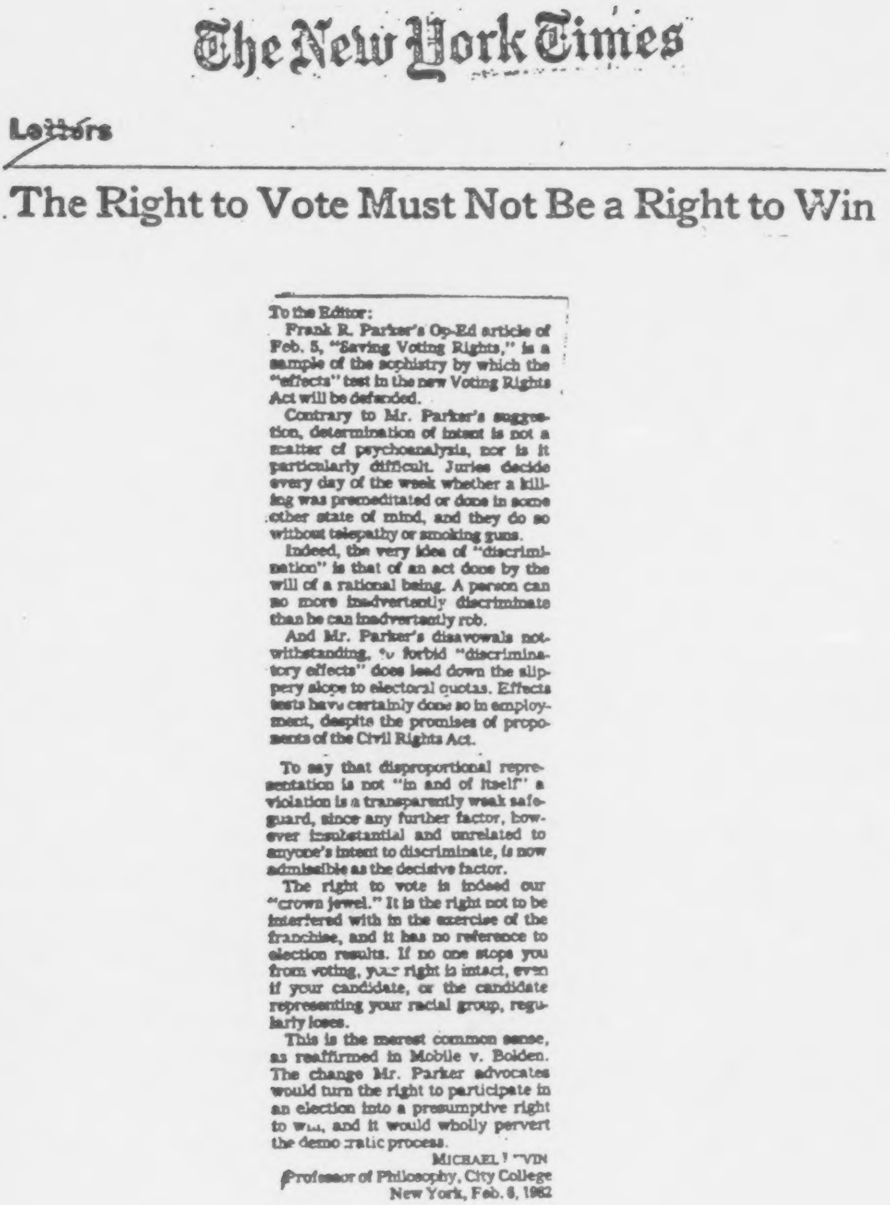
Nor have the courts suggested otherwise. The Post points to two decisions (*Whitcomb v. Chavis* and *White v. Regester*) in support of its claim that an "effects" test did in fact exist in Section 2 before the *Mobile* decision. Neither case, however, even involved Section 2 of the Voting Rights Act; rather, they both concerned claims brought under the Equal Protection Clause of the Fourteenth Amendment. Moreover, even on the Fourteenth Amendment question, both *Whitcomb* and *White* tacitly recognized that proof of discrimatory intent is a necessary element of the constitutional offense. Justice Stewart's opinion in *Mobile* makes this clear, and The Post's editorial suggestion to the contrary is simply legally incorrect.

Also unsound is The Post's assertion that discriminatory intent is "virtually impossible" to prove. Several Supreme Court decisions have made it abundantly clear that a "smoking gun" in the form of incriminatory statements or documents has never been required. Intent in this area, as in any other, may be proved by circumstantial and indirect evidence. Notably, the equal protection clause of the Fourteenth Amendment, responsible for so many historic civil rights advances, has a similar test.

There is a general consensus in this country that the temporary provisions of the Voting Rights Act should be extended for an additional period of time. Congress should not, however, introduce uncertainty and confusion into what has been the most successful piece of civil rights legislation ever enacted by making so dramatic a change in its permanent provisions. Section 2 therefore should be retained without change.

WILLIAM BRADFORD REYNOLDS
Assistant Attorney General
(Civil Rights Division)

Washington



The New York Times

Letters

The Right to Vote Must Not Be a Right to Win

To the Editor:

Frank R. Parker's Op-Ed article of Feb. 5, "Saving Voting Rights," is a sample of the sophistry by which the "effects" test in the new Voting Rights Act will be defended.

Contrary to Mr. Parker's suggestion, determination of intent is not a matter of psychoanalysis, nor is it particularly difficult. Juries decide every day of the week whether a killing was premeditated or done in some other state of mind, and they do so without telepathy or smoking guns.

Indeed, the very idea of "discrimination" is that of an act done by the will of a rational being. A person can no more inadvertently discriminate than he can inadvertently rob.

And Mr. Parker's disavowals notwithstanding, to forbid "discriminatory effects" does lead down the slippery slope to electoral quotas. Effects tests have certainly done so in employment, despite the promises of proponents of the Civil Rights Act.

To say that disproportional representation is not "in and of itself" a violation is a transparently weak safeguard, since any further factor, however insubstantial and unrelated to anyone's intent to discriminate, *is* now admissible as the decisive factor.

The right to vote is indeed our "crown jewel." It is the right not to be interfered with in the exercise of the franchise, and it has no reference to election results. If no one stops you from voting, your right is intact, even if your candidate, or the candidate representing your racial group, regularly loses.

This is the merest common sense, as reaffirmed in Mobile v. Bolden. The change Mr. Parker advocates would turn the right to participate in an election into a presumptive right to win, and it would wholly pervert the democratic process.

MICHAEL [illegible]VIN
Professor of Philosophy, City College
New York, Feb. 8, 1982

To the Editor:

Frank Parker's article is typical of the desultory debate which has accompanied the attempt to amend Section 2 of the Voting Rights Act. The City of Mobile case has not, as Parker contends, "drastically altered" the intent standard of the current Section 2.

A successful claim under the 15th Amendment has always been conditioned upon a showing of discriminatory intent. Justice Stewart cited a venerable line of cases in support of this contention; these cases routinely invalidated voting practices or procedures that were racially neutral on their face but could be traced to a "discriminatory intent."

In no case did this entail the necessity of finding a "smoking gun" or the psychological analysis of legislators' intention. The argument that says it is necessary to do so has been created out of whole cloth by those who seek to create a radical new standard for the Voting Rights Act.

The great concern — and one which I share — is that the proposed amendment of the Voting Rights Act will lead to the requirement of proportional representation based on race. The language of the amendment seeks to dispel this fear, but its assurances ring hollow: lack of proportionality "in and of itself" does not constitute a violation.

In most recent years, emphasis has shifted from the issue of equal access to the ballot for racial minorities to that of equal results. The issue is no longer typically conceived of in terms of the right to vote but in terms of the right to an *effective* vote.

The old assumption that equal access to the ballot would ineluctably lead to political power for minorities has given way to the proposition that the political process must produce something more than equal access. The new demand is that the political process, regardless of equal access, must be made to yield equal results.

But if results become the new standard by which equal access to the political process is tested (as the amendment of Section 2 explicitly demands), then proportionality is inevitable. The argument, in its simplest form, presumes that a political process "equally open" to minorities will produce proportional results. When faced with a lack of proportional results, it is merely assumed that the political process is not "equally open."

All sides agree that the Voting Rights Act has been remarkably successful and that the imposition of the standard of racial proportionality would undo much of that success. The burden of proof rests upon those who would drastically alter the standards of intent to demonstrate more persuasively than they have that the amendment of Section 2 will not create the very thing that everyone wishes to avoid.

EDWARD J. ERLER
Research Triangle Pk, N.C., Feb. 10, 1982

The writer is a scholar in residence at the National Humanities Center.

THE WALL STREET JOURNAL

REVIEW & OUTLOOK

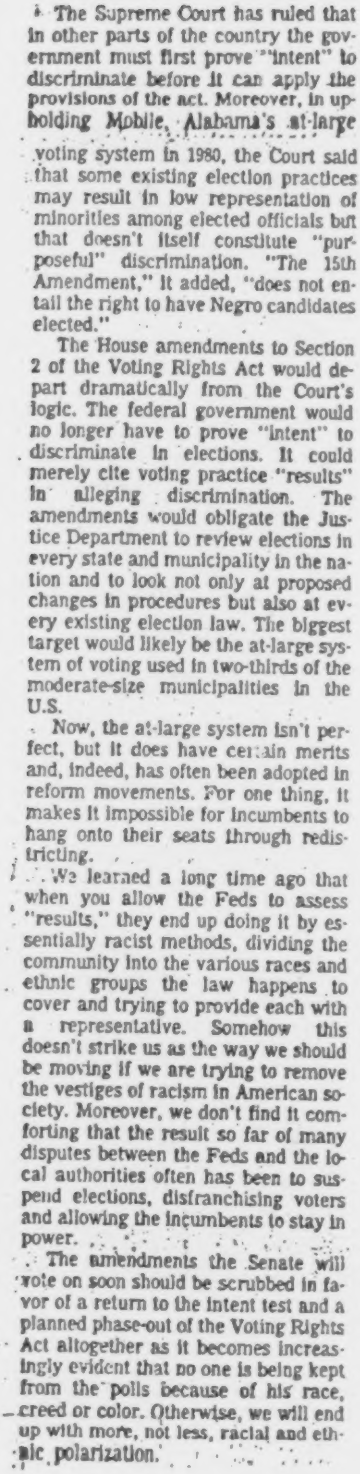
Voting Wrongs

New amendments to the Voting Rights Act of 1965 are up for Senate hearings this week and we wonder if the subcommittee on the Constitution will notice that they have a strange little quirk: In the name of protecting the right to vote they expand federal power to outlaw local elections. The contradiction escaped notice in the House, which already has passed the amendments.

This seems to be a case of Congress not knowing where to stop. The act, originally designed to overcome systematic denial of access to the polls in certain Southern states, has largely accomplished its purpose. In Mississippi, for example, 67% of the eligible blacks are registered, a tenfold increase from 1965. But in 1975 the law was expanded beyond the South and extended to "language minorities" as well. Today, because of "trigger mechanisms" that invoke the law where rights violations are suspected, all voting districts in nine states and some in 13 others are required to "preclear" with the Justice Department any proposed changes in election procedures. Thirty states are required to provide bilingual election material and assistance.

Around 35,000 proposed election law changes have been submitted to the Justice Department since 1965. Of those, Justice refused to allow 811, the bulk of which involved alleged reductions in "minority" voting power through districting changes and use of at-large as opposed to district representation. In some cases, Justice has blocked elections; New York City, for example, has yet to hold its 1981 City Council elections because of a redistricting dispute with Washington.

In only about a tenth of these cases did Justice find any "intent" to discriminate; in the rest, under the act's strict "preclearance" test, it merely found that the proposed changes would have a discriminatory "effect." This "effects" test currently applies only to those states and localities which had a history of intentional discrimination or disproportionate voting patterns.



The Supreme Court has ruled that in other parts of the country the government must first prove "intent" to discriminate before it can apply the provisions of the act. Moreover, in upholding Mobile, Alabama's at-large voting system in 1980, the Court said that some existing election practices may result in low representation of minorities among elected officials but that doesn't itself constitute "purposeful" discrimination. "The 15th Amendment," it added, "does not entail the right to have Negro candidates elected."

The House amendments to Section 2 of the Voting Rights Act would depart dramatically from the Court's logic. The federal government would no longer have to prove "intent" to discriminate in elections. It could merely cite voting practice "results" in alleging discrimination. The amendments would obligate the Justice Department to review elections in every state and municipality in the nation and to look not only at proposed changes in procedures but also at every existing election law. The biggest target would likely be the at-large system of voting used in two-thirds of the moderate-size municipalities in the U.S.

Now, the at-large system isn't perfect, but it does have certain merits and, indeed, has often been adopted in reform movements. For one thing, it makes it impossible for incumbents to hang onto their seats through redistricting.

We learned a long time ago that when you allow the Feds to assess "results," they end up doing it by essentially racist methods, dividing the community into the various races and ethnic groups the law happens to cover and trying to provide each with a representative. Somehow this doesn't strike us as the way we should be moving if we are trying to remove the vestiges of racism in American society. Moreover, we don't find it comforting that the result so far of many disputes between the Feds and the local authorities often has been to suspend elections, disfranchising voters and allowing the incumbents to stay in power.

The amendments the Senate will vote on soon should be scrubbed in favor of a return to the intent test and a planned phase-out of the Voting Rights Act altogether as it becomes increasingly evident that no one is being kept from the polls because of his race, creed or color. Otherwise, we will end up with more, not less, racial and ethnic polarization.

QUESTIONS AND ANSWERS: INTENT v. RESULT

(BY SENATOR ORRIN G. HATCH)

The Voting Rights Act debate will focus upon a proposed change in the Act that involves one of the most important constitutional issues to come before Congress in many years. Involved in this debate are fundamental issues involving the nature of American representative democracy, federalism, civil rights, and the separation of powers. The following are questions and answers pertaining to this proposed change. It is not a simple issue.

WHAT IS THE MAJOR ISSUE INVOLVED IN THE PRESENT VOTING RIGHTS ACT DEBATE?

The most controversial issue is whether or not to change the standard in section 2 by which violations of voting rights are identified from the present "intent" standard to a "results" standard. There is virtually no opposition to extending the provisions of the Act or maintaining intact the basic protections and guarantees of the Act.

WHO IS PROPOSING TO CHANGE THE SECTION 2 STANDARD?

Although the popular perception of the issue involved in the Voting Rights Act debate is whether or not civil rights advocates are going to be able to preserve the present Voting Rights Act, the section 2 issue involves a major change in the law proposed by some in the civil rights community. No one is urging any retrenchment of existing protections in the Voting Rights Act. The issue rather is whether or not expanded notions of civil rights will be incorporated into the law.

WHAT IS SECTION 2?

Section 2 is the statutory codification of the 15th Amendment to the Constitution. The 15th Amendment provides that the right of citizens to vote shall not be denied or abridged on account of race or color. There has been virtually no debate over section 2 in the past because of its noncontroversial objectives.

DOES SECTION 2 APPLY ONLY TO 'COVERED' JURISDICTIONS?

No. Because it is a codification of the 15th Amendment, it applies to all jurisdictions across the country, whether or not they are a 'covered' jurisdiction that is required to "pre-clear" changes in voting laws and procedures with the Justice Department under section 5 of the Act.

WHAT IS THE RELATIONSHIP BETWEEN SECTION 2 AND SECTION 5?

Virtually none. Section 5 requires jurisdictions with a history of discrimination to "pre-clear" all proposed changes in their voting laws and procedures with the Justice Department. Section 2 restates the 15th Amendment and applies to all jurisdictions; it is not limited either, as is section 5, to changes in voting laws or procedures.

WHAT IS THE PRESENT LAW WITH RESPECT TO SECTION 2?

The law with respect to the standard for identifying section 2 (or 15th Amendment) violations has always been an "intent" standard. As the Supreme Court reaffirmed in a decision in 1980, "That Amendment prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote on account of race or color." Mobile v. Bolden 446 U.S. 55.

DID THE MOBILE CASE ENACT ANY CHANGES IN EXISTING LAW?

No. The language in both the 15th Amendment and section 2 proscribes the denial of voting rights "on account of" race or color. This has always been interpreted to require purposeful discrimination. Indeed, there is no other kind of discrimination as the term has traditionally been understood. Until the Mobile case, it was simply not at issue that the 15th Amendment and section 2 required some demonstration of discriminatory purpose. There is no decision of the Court either prior to or since Mobile that has ever required anything other than an "intent" standard for the 15th Amendment or section 2.

WHAT IS THE STANDARD FOR THE 14TH AMENDMENT'S EQUAL PROTECTION CLAUSE?

The "intent" standard has always applied to the 14th Amendment as well. In Arlington Heights v. Metropolitan Authority, the Supreme Court stated, "Proof of a racially discriminatory intent or purpose is required to show a violation of the equal protection clause of the 14th Amendment." 429 U.S. 253 (1977). This has been reiterated in a number of other decisions, Washington v. Davis 426 U.S. 229 (1976); Massachusetts v. Feeney 442 U.S. 256 (1979). In addition, the Court has always been careful to emphasize the distinction between de facto and de jure discrimination in the area of school busing. Only de jure (or purposeful) discrimination has ever been a basis for school busing orders. Keyes v. Denver 413 U.S. 189 (1973).

WHAT PRECISELY IS THE "INTENT" STANDARD?

The "intent" standard simply requires that a judicial factfinder evaluate all the evidence available to itself on the basis of whether or not ot demonstrates some intent or purpose or motivation on the part of the defendant individual or community to act in a discriminatory manner. It is the traditional test for identifying discrimination.

DOES IT REQUIRE EXPRESS CONFESSIONS OF INTENT TO DISCRIMINATE?

No more than a criminal trial requires express confessions of guilt. It simply requires that a judge or jury be able to conclude on the basis of all the evidence available to it, including circumstantial evidence of whatever kind, that some discriminatory intent or purpose existed on the part of the defendant.

THEN IT DOES NOT REQUIRE "MIND-READING" AS SOME OPPONENTS OF THE "INTENT" STANDARD HAVE SUGGESTED?

Absolutely not. "Intent" is proven without "mind-reading" thousands of times every day of the week in criminal and civil trials across the country. Indeed, in criminal trials the existence of intent must be proven "beyond a reasonable doubt". In the civil rights area, the normal test is that intent be proven merely "by a preponderance of the evidence".

WHAT KIND OF EVIDENCE CAN BE USED TO DEMONSTRATE "INTENT"?

Again, literally any kind of evidence can be used to satisfy this requirement. As the Supreme Court noted in the Arlington Heights case, "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available. 429 U.S. 253, 266. Among the specific considerations that it mentions are the historical background of an action, the sequence of events leading to a decision, the existence of departures from normal procedures, legislative history, the impact of a decision upon minority groups, etc.

DO YOU MEAN THAT THE ACTUAL IMPACT OR EFFECTS OF AN ACTION UPON MINORITY GROUPS CAN BE CONSIDERED UNDER THE "INTENT" TEST?

Yes. Unlike a "results" or "effects"-oriented test, however, it is not dispositive of a voting rights violation in and of itself, and it cannot effectively shift burdens of proof in and of itself. It is simply evidence of whatever force it communicates to the fact-finder.

WHY ARE SOME PROPOSING TO SUBSTITUTE A NEW "RESULTS" TEST IN SECTION 2?

Ostensibly, it is argued that voting rights violations are more difficult to prove under an "intent" standard than they would be under a "results" standard.

HOW IMPORTANT SHOULD THAT CONSIDERATION BE?

Completely apart from the fact that the Voting Rights Act has been an effective tool for combatting voting discrimination under the present standard, it is debatable whether or not an appropriate standard should be fashioned on the basis of what facilitates successful prosecutions. Elimination of the "beyond a reasonable doubt" standard in criminal cases, for example, would certainly facilitate convictions. We have chosen not to adopt it because there are competing values, e.g. fairness and due process.

WHAT IS WRONG WITH THE "RESULTS" STANDARD?

First of all, it is totally unclear what the "results" standard is supposed to represent. It is a standard totally unknown to present law. To the extent that its legislative history is relevant, and to the extent that it is designed to be similar to an "effects" test, the main objection is that it would establish as a standard for identifying section 2 violations a "proportional representation by race" standard.

WHAT IS MEANT BY "PROPORTIONAL REPRESENTATION BY RACE"?

The "proportional representation by race" standard is one that evaluates electoral actions on the basis of whether or not they contribute to representation in a State legislature or a City Council or a County Commission or a School Board for racial and ethnic groups in proportion to their existence in the population.

WHAT IS WRONG WITH "PROPORTIONAL REPRESENTATION BY RACE"?

It is a concept totally inconsistent with the traditional notion of American representative government wherein elected officials represent individual citizens not racial or ethnic groups or blocs. In addition, as the Court observed in Mobile, the Constitution "does not require proportional representation as an imperative of political organization.

COMPARE THEN THE "INTENT" AND THE "RESULTS" TESTS?

The "intent" test allows courts to consider the totality of evidence surrounding an alleged discriminatory action and then requires such evidence to be evaluated on the basis of whether or not it evinces some purpose or motivation to discriminate. The "results" test, however, would focus analysis upon whether or not minority groups were represented proportionately or whether or not some change in voting law or procedure would contribute toward that result.

WHAT DOES THE TERM "DISCRIMINATORY RESULTS" MEAN?

It means nothing more than is meant by the concept of racial balance or racial quotas. Under the "results" standard, actions would be judged, pure and simple, on color-conscious grounds. This is totally at odds with everything that the Constitution has been directed towards since the Reconstruction Amendments, Brown v. Board of Education, and the Civil Rights Act of 1964. The term "discriminatory results" is Orwellian in the sense that it radically transforms the concept of discrimination from a process or a means into an end or a result.

ISN'T THE "PROPORTIONAL REPRESENTATION BY RACE" DESCRIPTION AN EXTREME DESCRIPTION?

Yes, but the "results" test is an extreme test. It is based upon Justice Thurgood Marshall's dissent in the Mobile case which was described by the Court as follows: "The theory of this dissenting opinion... appears to be that every 'political group' or at least every such group that is in the minority has a federal constitutional right to elect candidates in proportion to its numbers." The House Report, in discussing the proposed new "results" test, admits that proof of the absence of proportional representation "would be highly relevant".

BUT DOESN'T THE PROPOSED NEW SECTION 2 LANGUAGE EXPRESSLY STATE THAT PROPORTIONAL REPRESENTATION IS NOT ITS OBJECTIVE?

There is, in fact, a disclaimer provision of sorts. It is clever, but it is a smokescreen. It states, "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."

WHY IS THIS LANGUAGE A "SMOKESCREEN"?

The key, of course, is the "in and of itself" language. In Mobile, Justice Marshall sought to deflect the "proportional representation by race" description of his "results" theory with a similar disclaimer. Consider the response of the Court, "The dissenting opinion seeks to disclaim this description of its theory by suggesting that a claim of vote dilution may require, in addition to proof of electoral defeat, some evidence of 'historical and social factors' indicating that the group in question is without political influence. Putting to the side the evident fact that these gauzy sociological considerations have no constitutional basis, it remains far from certain that they could, in any principled manner, exclude the claims of any discrete group that happens for whatever reason, to elect fewer of its candidates than arithmetic indicates that it might. Indeed, the putative limits are bound to prove illusory if the express purpose informing their application would be, as the dissent assumes, to redress the 'inequitable distribution of political influence'."

EXPLAIN FURTHER?

In short, the point is that there will always be an additional iota of evidence to satisfy the "in and of itself" language. This is particular true since there is no standard by which to judge any evidence except for the "results" standard.

WHAT ADDITIONAL EVIDENCE, ALONG WITH EVIDENCE OF THE LACK OF PROPORTIONAL REPRESENTATION, WOULD SUFFICE TO COMPLETE A SECTION 2 VIOLATION UNDER THE "RESULTS" TEST?

Among the additional bits of "objective" evidence to which the House Report refers are a "history of discrimination", "racially polarity voting" (sic), at-large elections, majority vote requirements, prohibitions on single-shot voting, and numbered posts. Among other factors that have been considered relevant by the Justice Department's Civil Rights Division in the past in evaluating submissions by "covered" jurisdictions under section 5 of the Voting Rights Act are disparate racial registration figures, history of English-only ballots, maldistribution of services in racially definable neighborhoods, staggered electoral terms, municipal elections which "dilute" minority voting strength, the existence of dual school systems in the past, impediments to third party voting, residency requirements, redistricting plans which fail to "maximize" minority influence, numbers of minority registration officials, re-registration or registration purging requirements, economic costs associated with registration, etc., etc.

THESE FACTORS HAVE BEEN USED BEFORE?

Yes. In virtually every case, they have been used by the Justice Department (or by the courts) to determine the existence of discrimination in "covered" jurisdictions. It is a matter of one's imagination to come up with additional factors that could be used by creative or innovative courts or bureaucrats to satisfy the "objective" factor requirement of the "results" test (in addition to the absence of proportional representation). Bear in mind again that the purpose or motivation behind such voting devices or arrangements would be irrelevant.

SUMMARIZE AGAIN THE SIGNIFICANCE OF THESE "OBJECTIVE" FACTORS?

The significance is simple-- where there is a State legislature or a City Council or a County Commission or a School Board which does not reflect racial proportions within the relevant populatior that jurisdiction will be vulnerable to prosecution under section 2. It is virtually inconceivable that the "in and of itself" language will not be satisfied by one or more "objective" factors existing in nearly any jurisdiction in the country. The existence of these factors, in conjunction with the absence of proportional representation, would represent an automatic trigger in evidencing a section 2 violation. As the Mobile court, the disclaimer is "illusory".

BUT WOULDN'T YOU LOOK TO THE TOTALITY OF THE CIRCUMSTANCES?

Even if you did, there would be no judicial standard other than proportional representation. The notion of looking to the totality of circumstances is meaningful only in the context of some larger state-of-mind standard, such as intent. It is a meaningless notion in the context of a result-oriented standard. After surveying the evidence under the present standard, the courts ask themselves, "Does this evidence raise an inference of intent?" Under the proposed new standard, given the absence of proportional representation and the existence of some "objective" factor, a prima facie case has been established. There is no need for further inquires by the court.

WHERE WOULD THE BURDEN OF PROOF LIE UNDER THE "RESULTS" TEST?

Given the absence of proportional representation and the existence of some "objective" factor, the effective burden of proof would be upon the defendant community. Indeed, it is unclear what kind of evidence, if any, would suffice to overcome such evidence. In Mobile, for example, the absence of discriminatory purpose and the existence of legitimate, non-discriminatory reasons for the at-large system of municipal elections was not considered relevant evidence by either the plaintiffs or the lower Federal courts.

PUTTING ASIDE THE ABSTRACT PRINCIPLE FOR THE MOMENT, WHAT IS THE MAJOR OBJECTIVE OF THOSE ATTEMPTING TO OVER-RULE MOBILE AND SUBSTITUTE A "RESULTS" TEST IN SECTION 2?

The immediate purpose is to allow a direct assault upon the majority of municipalities in the country which have adopted at-large elections for city councils and county commissions. This was the precise issue in Mobile, as a matter of fact. Proponents of the "results" test argue that at-large elections tend to discriminate against minorities who would be more capable of electing "their" representatives to office on a district or ward voting system. In Mobile, the Court refused to order the disestablishment of the at-large municipal form of government adopted by the city.

DO AT-LARGE SYSTEMS OF VOTING DISCRIMINATE AGAINST MINORITIES?

Completely apart from the fact that at-large voting for municipal governments was instituted by many communities in the 1910's and 1920's in response to unusual instances of corruption within ward systems of government, there is absolutely no evidence that at-large voting tends to discriminate against minorities. That is, unless the premise is adopted that only blacks can represent blacks, only whites can represent whites, and only Hispanics can represent Hispanics. Indeed, many political scientists believe that the creation of black wards or Hispanic wards, by tending to create political "ghettoes" minimize the influence of minorities. It is highly debatable that black influence, for example, is enhanced by the creation of a single 90% black ward (that may elect a black person) than by three 30% black wards (that may all elect white persons).

WHAT ELSE IS WRONG WITH THE PROPOSITION THAT AT-LARGE ELECTIONS ARE CONSTITUTIONALLY INVALID?

First, it turns the traditional objective of the Voting Rights Act-- equal access to the electoral process-- on its head. As the Court said in Mobile, "this right to equal participation in the electoral process does not protect any political group, however defined, from electoral defeat." Second, it encourages political isolation among minority groups; rather than having to enter into electoral coalitions in order to elect candidates favorable to their interests, ward-only elections tend to allow minorities the more comfortable, but less ultimately influential, state of affairs of safe, racially identifiable districts. Third, it tends to place a premium upon minorities remaining geographically segregated. To the extent that integration occurs, ward-only voting would tend not to result in proportional representation. To summarize again by referring to Mobile, "political groups do not have an independent constitutional claim to representation."

WHAT WOULD BE THE IMPACT OF A CONSTITUTIONAL OR STATUTORY RULE PROSCRIBING AT-LARGE MUNICIPAL ELECTIONS?

The impact would be profound. In Mobile, the plaintiffs sought to strike down the entire form of municipal government adopted by the city on the basis of the at-large form of city council election. The Court stated, "Despite repeated attacks upon multi-member (at-large) legislative districts, the Court has consistently held that they are not unconstitutional." If Mobile were over-ruled, the at-large electoral structures of the more than 2/3 of the 18,000+ municipalities in the country that have adopted this form of government, would be placed in serious jeopardy.

WHAT WILL BE THE IMPACT OF THE "RESULTS" TEST UPON RE-DISTRICTING AND RE-APPORTIONMENT?

Re-districting and re-apportionment actions will also be judged on the basis of the proportional representation criterion. The New York Times, for example, in describing New York City's re-districting difficulties recently stated, "Lawyers for some of those who brought suit against the Council under the Voting Rights Act pointed out that statistics do not guarantee the election of minority group members. "It's twelve districts on paper, but at best it may be ten, maybe only nine, said Cesar A. Perales, general counsel to the Puerto Rican Legal Defense Fund." Minority groups alone will be largely immune to political or ideological gerrymandering on the grounds of "vote dilution".

WHAT IS "VOTE DILUTION"?

The concept of "vote dilution" is one that has been responsible for transforming other provisions of the Voting Rights Act (esp. section 5) from those designed simply to ensure equal *access* by minorities to the registration and voting processes into those concerned with electoral *outcome* and electoral *success* as well. The right to register and vote has been significantly transformed in recent years into the right to cast an "effective" , vote and the right of racial and ethnic groups not to have their collective vote "diluted". The concept of "vote dilution" in the section 5 context is separate from the section 2 issue, except that this concept is likely to be borrowed by the courts in implementing the new "results" test should it be adopted in section 2. See Thernstrom, "The Odd Evolution of the Voting Rights Act", 55 *The Public Interest* 49.

ARE THERE ANY OTHER CONSTITUTIONAL ISSUES INVOLVED WITH SECTION 2?

Since section 2 is the statutory expression of the 15th Amendment, and since both provisions have been interpreted by the Court in *Mobile* to require some evidence of intentional discrimination, there is a major constitutional question whether or not Congress can alter this by simple statute. Similar constitutional issues are involved in pending efforts by Congress to overturn the *Roe v. Wade* by defining "person" for purposes of the 14th Amendment. Beyond the question of conflict with a Supreme Court decision, there is the constitutional question whether or not Congress possesses the authority to establish a standard for section 2 violations in excess of its 15th Amendment authority.

WHO CAN INITIATE ACTIONS UNDER SECTION 2?

In addition to prosecution by the Justice Department, section 2 would permit private causes of action against communities. Individuals or so-called 'public interest' litigators could bring such actions.

WHAT IS THE POSITION OF THE ADMINISTRATION ON THE SECTION 2 ISSUE?

The Administration and the Justice Department are strongly on record as favoring retention of the intent standard in section 2. President Reagan has expressed his concern that the "results" standard may lead to the establishment of racial quotas in the electoral process. Press Conference, December 17, 1981.

SUMMARIZE THE SECTION 2 ISSUE?

The debate over whether or not to overturn the Supreme Court's decision in *Mobile v. Bolden*, and establish a "results" test for the present "intent" test in the Voting Rights Act, is probably the single most important constitutional issue that will be considered by the 97th Congress. Involved in this controversy are fundamental issues involving the nature of American representative democracy, federalism, civil rights, and the relationship between the branches of the national government.

MISCELLANEOUS TABLES

SECTION 5 SUBMISSIONS, BY STATE

The following chart shows the number of proposed changes in state election laws submitted to the Justice Department as required by the Voting Rights Act of 1965, and the number of changes to which the Justice Department has objected:

	Proposed election law changes				
	1965-70[*]	**1971-75**	**1976-80**	**Total**	**Justice Department objections**
Alabama	16	614	1,085	1,715	72
Alaska[3]	0	0	37	37	0
Arizona[4]	0	201	1,537	1,738	8
California[1]	—	12	683	695	5
Colorado[1]	—	0	233	233	0
Connecticut[2]	—	0	0	0	0
Florida[1]	—	1	167	168	0
Georgia	158	935	1,998	3,091	226
Hawaii[1]	0	0	9	9	0
Idaho[1]	0	0	1	1	0
Louisiana	5	882	1,709	2,596	136
Maine[2]	—	0	3	3	0
Massachusetts[2]	—	0	17	17	0
Michigan[2]	—	0	3	3	0
Mississippi	32	503	654	1,189	78
New Hampshire[2]	—	0	0	0	0
New Mexico[1]	—	0	65	65	0
New York[1]	—	166	326	492	5
Oklahoma[1]	—	0	1	1	0
North Carolina[1]	2	485	711	1,198	62
South Carolina	308	834	1,260	2,402	77
South Dakota	—	0	6	6	2
Texas	—	249	15,959	16,208	130
Virginia	57	1,093	1,780	2,930	14
Wyoming[1]	—	1	0	1	0
Total				34,798	815

[*] *The pre-clearance requirement, requiring submissions of proposed election law changes to the Justice Department, was enacted in 1965. The provision was continued through the extensions of the act in 1970 and 1975.*

[1] *Selected county or counties covered rather than entire state.*

[2] *Selected town or towns covered rather than entire state.*

[3] *Entire state covered 1965-68; selected election districts covered 1970-72; entire state covered since 1975.*

[4] *Selected county or counties covered until 1975; entire state now covered.*

— Not covered for years indicated.

Source: U.S. Department of Justice

SOME FIGURES ABOUT MINORITY REGISTRATION AND REPRESENTATION

In the South Carolina v. Katzenbach case, the Supreme Court ruled that the extraordinary remedies of the Voting Rights Act were constitutional only because of the "exceptional conditions" in the covered States. A critical issue that must be considered during the debate on the Act this year will be whether or not these "exceptional" conditions still exist.

Registration Rates for Black Voters in Jurisdictions covered since 1965
(1976 Figures)

GEORGIA	74.8%
LOUISIANA	63.0%
MISSISSIPPI	60.7%
NAT. AVERAGE	58.5%
ALABAMA	58.4%
SOUTH CAROLINA	56.5%
NORTH CAROLINA	54.8%
VIRGINIA	54.7%

In addition, these States compare favorably with other States in terms of electing black individuals to public office. Six of these States rank in the top ten, and the seventh is in the top twenty.

STATE (*Covered)	BLACK ELECTED OFFICIALS 1979	RANK
LOUISIANA *	334	1
MISSISSIPPI *	327	2
ILLINOIS	276	3
MICHIGAN	272	4
NORTH CAROLINA *	240	5
GEORGIA *	237	6
CALIFORNIA	227	7
ARKANSAS	226	8
SOUTH CAROLINA *	222	9
ALABAMA	208	10
VIRGINIA *	88	19

Jurisdictions Covered by the Voting Rights Act

1. States and political subdivisions now covered for pre-clearance as a result of the 1965 triggering formula: Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, 39 counties in North Carolina, and one county each in Arizona and Hawaii.

2. Political subdivisions now covered as a result of the 1970 triggering formula: 8 counties in Arizona, 2 counties in California, 3 towns in Connecticut, 1 county in Idaho, 9 towns in Massachusetts, 10 towns in New Hampshire, 3 counties in New York, and 1 county in Wyoming.

3. States and political subdivisions now covered for pre-clearance as a result of the 1975 triggering formula: Alaska, Arizona, 2 counties in California, 1 county in Colorado, 5 counties in Florida, 2 townships in Michigan, 1 county in North Carolina, 2 counties in South Dakota, and Texas.

4. Section 203 coverage (bilingual election materials and assistance) is applicable until 1985 to the following:

Alaska	14 districts
Arizona	14 counties
California	39 counties
Colorado	34 counties
Connecticut	1 county
Florida	7 counties
Hawaii	4 counties
Idaho	2 counties
Kansas	3 counties
Louisiana	1 parish
Maine	1 Ind. Res.
Michigan	9 counties
Minnesota	2 counties
Mississippi	1 county
Montana	7 counties
Nebraska	2 counties
Nevada	4 counties
New Mexico	32 counties
New York	3 counties
North Carolina	4 counties
North Dakota	5 counties
Oklahoma	25 counties
Oregon	2 counties
South Dakota	8 counties
Texas	142 counties
Utah	5 counties
Washington	5 counties
Wisconsin	4 counties
Wyoming	5 counties

NUMBER OF CHANGES TO WHICH OBJECTIONS HAVE BEEN INTERPOSED BY THE DEPARTMENT OF JUSTICE BY TYPE AND YEAR FROM 1965 - FEBRUARY 28, 1981

TYPE OF CHANGE	1965 to 1969	1970 to 1974	1975	1976	1977	1978	1979	1980	1981	TOTAL
REDISTRICTING	--	55	11	11	3	12	2	9	--	103
ANNEXATION	--	9	86	68	55	1	15	9	1	243
POLLING PLACE	--	12	3	--	2	7	2	4	--	30
PRECINCT	--	5	--	--	--	--	--	2	--	7
REREGISTRATION OR VOTER PURGE	--	1	1	--	1	--	--	--	--	3
INCORPORATION	--	1	--	--	--	1	--	3	--	5
BILINGUAL PROCEDURES			--	3	2	--	--	1	--	6
METHOD OF ELECTION	4	145	31	61	38	24	17	14	3	334
FORM OF GOVERNMENT	--	4	1	1	1	1	2	--	--	10
CONSOLIDATION OR DIVISION OF POLITICAL UNITS	1	1	1	2	--	1	1	--	--	7
SPECIAL ELECTION	--	1	--	1	1	--	1	3	--	7
VOTING METHODS	--	--	--	--	--	--	1	1	--	2
CANDIDATE QUALIFICATION	2	5	2	1	--	--	--	1	--	11
VOTER REGISTRATION PROCEDURE	1	4	1	--	1	--	--	2	--	9
MISCELLANEOUS	14	8	1	3	--	2	4	2	--	34
TOTALS	22	251	138	151	104	49	45	51	4	811

SOURCE:
U.S. Department of Justice, Civil Rights Division, Voting Section, February, 1981.

I. Formulas used to determine coverage with Voting Rights Act.

Racial Minorities

- The jurisdiction, on November 1, 1964, maintained a 'test or device' as a condition for registering to vote, and less than 50% of its total voting age population participated in the 1964 Presidential election (Section 4(b))

- The jurisdiction, on November 1, 1968, maintained a 'test or device' as a condition for registering or voting, and less than 50% of the total voting age population participated in the 1968 Presidential election (Section 4(b))

Language Minorities

- More than 5% of the citizens of voting age in a jurisdiction were members of a single-language minority group as of November 1, 1972, and the jurisdiction provided registration and election materials in English only as of November 1, 1972, and less than 50% of the citizens of voting age participated in the 1972 Presidential election (Section 4(f) (3))

- More than 5% of the citizens of voting age in the jurisdiction are presently members of a single-language minority group, and the illiteracy rate of such persons as a group is higher than the national average (Section 203(b))

II. Duration of special coverage.

Year In Which Jurisdiction Was Covered	Duration of Coverage	Date of Eligibility For Removal
1965 (through determinations made with respect to 1964 election)	17 years	August 6, 1982
1970 (through determinations made with respect to 1968 election)	17 years	August 6, 1987
1975 (through determinations made with respect to 1972 election)	10 years	August 6, 1985
1975 (under Section 203)	10 years	August 6, 1985

III. Jurisdictions where preclearance is required.

Statewide

*Alabama
Alaska
Arizona
*Georgia
*Louisiana
*Mississippi
*South Carolina
Texas
*Virginia

Portions of State

California
Colorado
Connecticut
Florida
*Hawaii
Idaho
Maine
Massachusetts
Michigan
New Hampshire
New York
*North Carolina
South Dakota
Wyoming

* Jurisdiction able to seek removal from coverage if certain provisions of Section 4 are allowed to expire (+ 3 counties in Arizona)

The odd evolution of the Voting Rights Act

ABIGAIL M. THERNSTROM

THE Voting Rights Act of 1965 ushered in a revolution. In 1964 James Chaney, Andrew Goodman, and Michael Schwerner were murdered while participating in a voter-registration drive in Neshoba County, Mississippi. In that year less than 7 percent of Mississippi's adult blacks were registered to vote. Within three years black registration approached 60 percent. Ten years after the murders, there were 191 black elected officials in Mississippi alone; prior to the passage of the act, there had been fewer than 100 in the entire South.

The Voting Rights Act was the fourth modern attempt at ensuring the rights of disenfranchised Southern blacks, but the first effective one. The Civil Rights Acts of 1957, 1960, and 1964 had done little more than allow county-by-county injunctions against prejudiced registrars. But such case-by-case adjudication, requiring lengthy litigation in piecemeal fashion, had proven largely ineffective. There were too many recalcitrant registrars, too many indifferent judges, too many uninformed and illiterate blacks. Nor had the heroic efforts of civil rights activists in the early 1960's had much impact. Student Non-violent Coordinating Committee volunteers working in LeFlore County, Mississippi had enlarged the ranks of black voters by only 300. Yet within two months of the initiation of Federal intervention, following the passage of the 1965 act, approximately 5,000 blacks were registered in that same county.

Such immediate and massive registration was precisely the purpose of the legislation, but today the simplicity of that aim has been largely forgotten. Success generated a new view of the protection that was afforded blacks and other minorities by the act. And so, as the problem of registration receded, a host of new and startling questions arose. Should a literacy test, even one administered impartially, be considered discriminatory where there has been a history of unequal educational opportunity? Do multimember electoral districts impermissibly dilute the political strength of minorities? Can heavily black cities annex largely white suburbs without violating Federally protected rights? Are constitutional rights infringed when the Justice Department forces a redrawing of district lines in order to achieve maximum minority representation?

Behind these questions lies a radical redefinition of the meaning of political equality for racial and ethnic groups. The traditional concern of civil rights advocates had been access to the ballot. But these questions involve not simply access, but *result*. They assume a Federally guaranteed right to maximum political *effectiveness*. Nowadays local electoral arrangements are expected to conform to Federal executive and judicial guidelines established to maximize the political strength of racial and ethnic minorities, not merely to provide equal electoral opportunity.

From access to results

The Voting Rights Act, then, ushered in a dual revolution: Not only were the names of two million blacks added to the registration rolls, but the definition of enfranchisement changed. The right to vote came to mean the right to equal electoral *result* and maximum political effectiveness.

That no one in 1965 contemplated such a development is indisputable. Equality in the mid-1960's meant equal opportunity, not equal result. Preferential admissions programs were not initiated until the end of the decade. Opportunity in employment did not begin to be measured by the standard of group parity until around 1970. And the use of racial quotas for the purpose of integrating primary and secondary schools was constitutionally sanctioned only in 1971.

In the original Voting Rights Act the emphasis was on equal political opportunity—that is, equal access through securing the ballot. In the Judiciary Committee hearings prior to passage, Attorney

General Katzenbach described the act as "aimed at getting people registered." "Our concern today," he said, "is to enlarge representative government. It is to solicit the consent of all the governed. It is to increase the number of citizens who can vote."

Katzenbach was convinced that black ballots were the key to Southern recognition of other Federally protected rights. As Deputy Attorney General under Kennedy, he had been part of a concerted effort to push civil-rights leaders into focusing on voting rights. Some had complained that Washington was nudging the movement away from massive social change and on to safe ground. But by 1965 that safe ground was widely regarded as the territory the movement had to conquer first.

If the ballot was the key to other rights, the elimination of the literacy test was the means to the ballot. "No matter from what direction one looks at it," V. O. Key had written in 1949, "the Southern literacy test is a fraud and nothing more." It was no less a fraud in 1965. In the 1960's, Southern registrars were observed testing black applicants on such matters as the number of bubbles in a soap bar, the meaning of obscure passages in state constitutions, and the definition of such terms as "habeas corpus." Booker T. Washington had believed that "brains, property, and character" would "settle the question of civil rights," but 80 years after the founding of Tuskeegee Institute blacks with brains, property, and character in the city of Tuskeegee still found themselves unable to demonstrate their literacy. "If a fella makes a mistake on his questionnaire, I'm not gonna discriminate in his favor just because he's got a Ph.D.," the chairman of the Board of Registrars righteously maintained.

What the Voting Rights Act did, then, was to suspend Southern literacy tests—though indirectly. Without naming any states explicitly, the act inferred a statistical link between low voter registration or turnout, literacy tests, and discrimination. By providing for the automatic suspension of all tests wherever there was inadequate political participation, it circumvented the difficult task of attempting to prove discrimination. No state which had either a registration or turnout of less than 50 percent of the voting-age population in the Presidential election of 1964 could employ *any* test or device to screen potential voters.

While the target of the act was clearly the South, in fact the ban on tests wherever there was low registration or turnout affected as well a smattering of counties in such states as Arizona, Hawaii, and Idaho. But at the discretion of the District Court of the District of Columbia coverage by the act could be waived.

Judicial discretion had been considered the bane of previous civil-rights bills. Yet the Voting Rights Act did not shift authority from the judiciary to the executive; it augmented the power of both. But the Southern district courts—described by Katzenbach at the hearings as beyond redemption—lost out. For though disputes involving Federal rights are normally taken to a local district court, cases arising under the Voting Rights Act are almost exclusively under the jurisdiction of the District Court of the District of Columbia. And appeals from its decisions go directly to the Supreme Court. It was not a unique arrangement, but Southerners saw it as an insult to Southern justice. "On what basis," Senator Sam Ervin asked, "can you justify saying, 'Close all the courts in the land except one'?"

Justice Hugo Black was among those who saw in the arrangement the ghost of Reconstruction. He was particularly irked by what was called the "preclearance" provision. Section 4 suspended literacy tests and other "devices" in all states and political subdivisions with a voting registration or turnout of less than 50 percent. The preclearance provision—section 5—reinforced section 4 by forbidding in those same jurisdictions the institution of any new "voting qualification or prerequisite to voting" without the approval of the Attorney General or the D.C. court. As Justice Black described it, states were treated like "conquered territories." "I doubt," he said, "that any of the thirteen colonies would have agreed to our Constitution if they had dreamed that the time would come when they would have to go to a United States Attorney General or a District of Columbia court with hat in hand begging for permission to change their laws."

Nevertheless, the motive behind the provision was clear. Southern states were adept at the fine art of circumvention. Banishing literacy tests, it was feared, might not be sufficient. New devices could be created with the same impact as old. Registration could be blocked anew.

The change in section 5

While section 5 was originally regarded as nothing more than a corollary of section 4—the one banning literacy tests and the other making sure that the effect of that ban stuck—in time the provision took on quite a different meaning. It became the instrument by which the definition of enfranchisement was altered. What was a new "standard, practice, or procedure with respect to voting" that had to be precleared to determine that it was not discriminatory? By 1969 procedural changes covered by the act had come to include making an office appointive instead of elective, increasing the requirements for an independent to gain a place on the ballot, and, most important, switching from ward to at-large voting. Later decisions added district-line and city-boundary changes. Thus in 1974 the Attorney General determined that a reapportionment plan for Kings County, New York had to be cleared, even though that plan did not in any way constitute an effort to resist the registration of blacks: New York State had a literacy test and King's County was one of three New York counties with voter turnout below 50 percent. But by then the entire notion of anticipating Southern resistance had been long lost, and the provision transformed.

The original conception died largely because Southern resistance was so successfully extinguished. With the passage of the act, the registration of Southern blacks soared. By September 1967 registration in Mississippi had risen from an estimated pre-act figure of around 7 percent of the voting-age population to almost 60 percent. In other states the rise was less spectacular, but still impressive.

In part, Southern resistance to registration never materialized because the act—as originally conceived—was on solid constitutional ground, and the South knew it. The Fifteenth Amendment prohibited the denial of the right to vote on account of race, and Congress had been given the power to enforce that prohibition by appropriate legislation. The Voting Rights Act was an unimpeachable exercise of that undeniable power. More important, registration was difficult to prevent, for the power given both to the Attorney General and to the District Court of the District of Columbia was extraordinary. And so, in a short time section 5 was deprived of its clearest function. Originally intended to forestall devices designed to hinder black registration, it was left without any obvious use.

A new one, however, soon appeared: ensuring electoral effectiveness. In every Southern state black ballots were being counted, yet in many districts they appeared to have little impact. By 1969 that had become the central concern of both the Justice Department and the D.C. District Court.

The end of literacy tests

The emergence of section 5 as a tool for guaranteeing minority groups maximum electoral effectiveness was aided by a district court decision in the important case of *Gaston County v. U.S.* Under section 4 literacy tests had been suspended in all jurisdictions with a voting registration or turnout of less than 50 percent—a suspension that could be waived if a test were shown to be nondiscriminatory. In 1968 North Carolina's Gaston County brought suit in the D.C. District Court to procure such a waiver. Six years earlier, the county had replaced its traditional oral test with a written one, and had begun a well-publicized process of reregistering all voters. Announcements blanketed both white and black sections of town. The court did not question the test's impartiality.

The Southern setting, of course, made the test suspect. But though the Voting Rights Act was clearly aimed at the South, it did provide for exemptions, and counties such as Gaston should have qualified. The court, however, turned Gaston's petition down. It found the test discriminatory—not in purpose, but in effect. Gaston County had maintained segregated schools until 1965, and, Judge Skelly Wright argued, unequal educational opportunity had resulted in an unequal ability to pass the test. Thus the test penalized blacks for inadequacies imposed by the state.

Although Judge Wright spoke of North Carolina's history of segregation, in fact his logic could be applied to most Northern cities as well. There was no such thing as a racially blind literacy test, Judge Wright effectively ruled. It was a variation on the theme that has since become so familiar: When opportunities have not been equal, meritocratic systems don't work. Gaston had been attempting to administer a test of merit in the context of unequal educational opportunity.

It was a plausible but troubling argument. The Voting Rights Act had assumed that there was a difference between a region that used a literacy test to oppress a racial minority and one that exercised its traditional authority to set standards for voting. It assumed that while race could not be made a qualification, competency could. Judge Wright's reasoning, however, blurred that distinction—or at least dismissed it as worthless in the setting of Gaston.

Judge Wright's opinion had an effect far beyond Gaston County. The interpretation the courts have given to the Voting Rights Act has affected Congressional perception of the act as well. Judge Wright's decision strengthened the hands of those in Congress who favored the abolition of *all* literacy tests. Enlisting Wright's argument, they succeeded in 1970 in amending the act to provide for a nationwide suspension of all literacy tests for a five-year period. In 1975 that suspension was converted to a permanent ban.

Judge Wright's opinion also promoted the cause of those who argued that through the intervention of Federal power the process of political change could be greatly accelerated. The framers of the original Voting Rights Act had assumed that a massive registration of blacks would eventually result in a radical redistribution of political power. But in Judge Wright's view, judicial intervention could speed up that painstaking process.

That view was challenged by Judge Oliver Gasch. In a concurring opinion Judge Gasch contended that an absence of economic (not educational) opportunity had created black illiteracy.[1] Blacks were disproportionately illiterate because they went to work and not to school. Even the segregated schools, had blacks attended them, would have provided sufficient education to pass the county's very simple test.

Judge Gasch was suggesting (although he did not spell it out) that Federal courts cannot remedy wrongs built into the very structure of society. Unequal education opportunities often result from inequities in the economic structure, but since courts are helpless to affect the latter, they cannot undo the effects of the former. The level of black illiteracy in the end may be the responsibility of the state, but questions of such ultimate responsibility are not—and cannot be—the normal concern of courts.

Yet Judge Wright (and with him Judge Spottswood Robinson) swept that suggestion aside. The registration of blacks, they were convinced, need not await a change in the level of economic opportunity. The process of political change need not be so laborious. While the district court could not directly attack the economic structure, it could lessen the impact of that structure on the political power of minorities. In fact, it was the court's duty to do so. For minorities had the right—as the Supreme Court subsequently agreed—not simply to equal political opportunity, but to equal electoral result.

Disenfranchisement and dilution

The implementation of that right awaited the remaking of section 5. Though Judge Wright's opinion in *Gaston* cleared the way, it was the Supreme Court's 1969 decision in *Allen v. Board of Elections* that definitively altered the meaning of that provision.

The case, which involved several statutory amendments to electoral procedure—the most important of which was a switch from single-member district to at-large voting in the election of Mississippi county supervisors—opened the way for the Court to rule on the scope of section 5. Were the amendments "practices or procedures" that violated the provision? Did they need to be cleared by either the District of Columbia court or the Attorney General? The Court held that, because the changes had the potential of *diluting* the black vote, they were subject to review. "The Voting Rights Act," Chief Justice Warren asserted, "was aimed at the subtle as well as the obvious state regulations which have the effect of denying citizens their right to vote because of race."

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[1] The opinion reads like a dissent, but was actually a concurrence. Gasch agreed with the result reached by the court, but on entirely different grounds. The county, he said, had failed to meet the required burden of proof—a demonstration that every election within its boundaries had been conducted in a nondiscriminatory manner.

This was a cumbersome rewording of Justice Frankfurter's 1939 observation that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." The Voting Rights Act, and the constitutional amendment upon which it rested, clearly barred subtle as well as obvious disenfranchisement. But what constituted disenfranchisement? That was the difficult issue.

The question of the impact of at-large voting is particularly complex. Multimember districts, it is generally argued, benefit the strong against the weak. The party of the majority is able to capture all contested seats. As a result, it is said, political groups are not represented in proportion to their strength in the voting population, and minorities lose out. But in fact multimember voting does not *always* disadvantage a minority—an at-large arrangement, in which every single vote counts, may actually benefit blacks. Single-member wards often permit a white majority to ignore a black enclave. But in an at-large system whites may be forced to compete for black votes.

Equally important, disadvantage and disenfranchisement are not the same. Multimember systems may disadvantage blacks, but they do not disenfranchise them. There is no electoral system that ensures representation precisely in proportion to the potential strength of every group. Every districting system discriminates. The drawing of district lines—whether ward or multimember—has an inevitable impact upon the effective power of various political groups. Some groups are split; others find themselves concentrated to the point of greatly diminished returns; candidates of equal quality are not equally available in all wards; district lines often separate a candidate from his natural constituency; and so on. No district with a population greater than one can be created that will guarantee to each voter equally effective political power.

In fact, not only the task of drawing district lines, but even the political process itself discriminates. Formal and informal aspects of government disadvantage some groups and advantage others. Neither campaign funds nor political talent are evenly distributed. A multitude of political decisions made before and after elections affect power. Political alliances make and break programs. How can political weight be judicially distributed so that every vote has equal value?

That dilution is not the same thing as disenfranchisement was acknowledged by Chief Justice Warren in *Allen*. "The right to vote," he said, "can be *affected* by a *dilution* of voting power as well as by an absolute prohibition on casting a ballot" (emphasis mine). Warren carefully distinguished diluting from denying, but he neglected to point out that the Fifteenth Amendment—on which the Voting Rights Act was based and to which the case thus ultimately referred—only protects against denials.

There is one circumstance in which dilution does shade into denial, and it is this circumstance that Chief Justice Warren must have had in mind, for he went on to say: "Voters who are members of a racial minority might well be in a majority in one district, but in a decided minority in the county as a whole. This type of change [at-large voting] could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting." A racial minority, in other words, *can* find itself permanently locked out, if one assumes (as evidently Warren did) consistent and persistent racial bloc voting. But, in general, to disadvantage a political minority is not to disenfranchise it. Most political losers can imagine a context structured more to their benefit, yet few would argue that they possess either a statutory or a constitutional right to an optimal political environment. But when politics and race become thoroughly entwined—when political identity is inextricably linked with racial identity—then such a claim becomes enticing.

In situations which are politically fluid, disadvantaged voters are not considered disenfranchised. Democrats in a Republican community, for example, are free to join the Republican Party and bore from within. Candidates can choose to emphasize certain issues at the expense of others in an effort to win votes. But in a situation of true racial bloc voting, there is no vying for votes across racial lines. Between two candidates of different races, there is no contest at all. Campaigning is unnecessary; a racial count will do. Color becomes the sole determinant of political effectiveness.

Such a situation must be distinguished from one in which black, white, and other citizens belong to political interest groups that cross racial lines. Race and politics are not necessarily coterminous. While at-large voting usually works to the disadvantage of a political minority, it does not always nullify the ability of blacks to elect candidates of their choice.

The crucial distinction is blurred by Chief Justice Warren's opinion in *Allen*. He begins by speaking about the necessity to guard against the dilution effect of at-large voting. Voting, it is asserted, includes "all activities necessary to make a vote effective." But the racial disenfranchisement he clearly had in mind had nothing to do with an imbalance in political effectiveness. The reference to a "candidate of their choice" makes clear the Chief Justice's perspective: He is envisioning color-coordinated politics—the color of the candidate unfailingly matching the color of his constituency. And he is asserting the right of a minority racial bloc to equal access to the political process.

Allen set the tone for all future Voting Rights Act litigation. It permanently blurred the distinction between disenfranchisement and dilution, and between equality of political opportunity and equality of electoral result.

A change of focus

The impact of the decision was not confined to the courts. It had an immediate effect on Justice Department policy as well. The voting section of the Civil Rights Division is primarily responsible for enforcing the Voting Rights Act. Most disputes concerning section 5 are settled by negotiation between local and Federal attorneys; suits are brought in the District Court of the District of Columbia only as a last resort.

In the years between the passage of the act in 1965 and the *Allen* decision in 1969, the focus of Justice Department attorneys was on section 4. The aim was to get Southern blacks registered. But the Justice Department conceived of its role as exceedingly limited—a conception born, in part, of necessity: The Civil Rights Division had a staff of approximately 40 to handle all litigation involving the infringement of civil rights in the South. Yet ideology also restrained the Department. Both Robert Kennedy and Ramsey Clark preferred negotiation to confrontation. They believed in working behind the scenes, in securing compliance through persuasion.

Ironically, it was under Nixon that Justice Department policy radically altered. Beginning in 1969, the Voting Rights Act, and particularly section 5, was enforced with unprecedented aggressiveness. In part, the new militance was the unforeseen consequence of bureaucratic reorganization. Beginning in 1969, attorneys were no longer assigned to a geographical region, but instead to such legal specialties as housing, education, or public accommodations. A voting section was thus created and a cadre of attorneys devoted to the enforcement of the Voting Rights Act emerged. The new specialists had a vested interest in interpreting the act as broadly as possible.

Thus the decision in *Allen* legitimized policies to which this new cadre of attorneys was already committed. The voting section had been at odds with Attorney General Mitchell over the scope of section 5. Mitchell had argued in the 1969 hearings on the extension of the act that section 5 should not be read to cover either redistricting or annexations. He lost both in the courts and Congress. *Allen* was the turning point. Within seven days of the decision, the voting section began to enforce a refurbished section 5. It began to send instructional packets to legal officers in the covered jurisdictions, informing them of the necessity to clear every change in voting procedure with either the Attorney General or the District Court of the District of Columbia. And whereas only 323 voting changes had been received for preclearance by the Department in the years between 1965 and 1969, almost 5,000 were submitted between 1969 and 1975.

The interpretation which the Supreme Court had given to section 5 in *Allen* was not created out of whole cloth. From one perspective, Chief Justice Warren in *Allen* was simply reading into a statute resting on the Fifteenth Amendment those standards for equally effective political participation that had been developed in the Fourteenth Amendment one-man, one-vote cases. *Baker v. Carr*, for example, had established in 1962 a constitutional right to equal representation for equal numbers.

But "rotten boroughs" are not strictly analogous to multimember districts, nor was the principle enunciated in *Allen* a necessary extension of that established in the legislative reapportionment decisions. Those decisions focused on individual voter weight, and measured that weight solely by the standard of equal district populations. Their concern was the malapportionment of *individuals*, not the malrepresentation of *interests*. In contrast, *Allen* and subsequent Voting Rights Act decisions establish the necessity for equality among groups—specifically among racial and (more recently) ethnic groups. Today, the test of disenfranchisement is not whether one person's vote is worth more than another's, but whether the group to which that person belongs is "underrepresented" in the system. Group power, not individual worth, is made the measure of political equity.

Quite a different conception was initially built into the Voting Rights Act. Sponsors of the original legislation assumed that once blacks had access to the ballot, their position in the polity would be normalized. They would be citizens in that most elementary sense of the word, possessing the right to lend a voice to the political process. Those sponsors assumed that, in time, an end to discrimination would bring an end to racial bloc voting. Color-blind politics was the ultimate goal: the true integration of Southern blacks in a color-blind electoral process.

But the Court's redefinition of section 5 marks an abandonment of those hopes. It envisions blacks as a permanent group apart. It assumes that there is no escape from race. It acquiesces in separate politics for separate racial and ethnic groups, demanding only that between those groups there should be rough equality. Hence the necessity to be on constant alert for threats to black political power —the necessity to make sure that blacks have more than the right to go to the polls, to make sure that the vote they cast there will have maximum weight.

Perhaps color-blind politics in this color-conscious society was a naive hope, and political access too restricted a goal. Racial bloc voting may be the reality for some time to come, and ward politics may indeed make the most sense for most minorities in most communities. Yet incorporating this depressing political assumption into the Voting Rights Act is costly, for it produces a society in which political interests are defined by racial or ethnic identity and representation is guaranteed in proportion to groups' numerical strength. For when a perceived reduction in the potential power of a racial or ethnic group is called disenfranchisement, then proportional racial representation inevitably becomes the standard by which proper political effectiveness is measured. And although the Supreme Court has had an occasional second thought (not shared by either the D.C. District Court or the Justice Department), this is the basic standard that has applied since *Allen*. Moreover, it has been extended from blacks to a variety of other ethnic groups as well, for in the last few years both the ethnic and geographic scope of the act have been enormously expanded.

Whether we want a society in which citizens are assigned slots on the basis of their race or ethnicity is, of course, precisely the question that the *Bakke* case has since raised with reference to higher education. And it has been the issue in a series of constitutional cases dealing with the problem of desegregation at the elementary and secondary school level. Whether either preferential admissions or pupil assignment in the interest of racial balance makes much sense is far from settled. But whatever the outcome of that debate, it is not likely to settle the question of proportional racial representation in politics, for none of the reasons customarily given for the use of racial and ethnic quotas in education apply to the realm of voting.

Proportionality, race, and party

In 1971, with the Supreme Court's decision in *Swann*, racial quotas became a permissible tool with which to dismantle a dual school system. Two assumptions lay behind the Court's ruling: that had there not been a history of *de jure* segregation, schools in the North Carolina district of Charlotte-Mecklenburg would have been racially mixed; and that racially neutral pupil assignment had become inadequate to the task of creating that previously impeded mix. The law of inertia, it was believed, governed segregation, and once set in motion could be checked only by determined interference in the form of racially conscious action. Racial quotas, then, were a permissible means of achieving the racial mix that would have occurred had there been no policy of deliberate segregation, although they were forbidden as an end in themselves. The use of quotas or goals in preferential-admissions programs is supported by a different logic. The motivation in such cases is not to provide an adequate remedy for constitutional wrongs, but to furnish compensation for educational deficiencies produced by centuries of discrimination, public and private.

Neither of those justifications applies to voting. The problem for the Southern black was not a dual system, as in schools, but no access at all. Blacks were not politically "segregated"; they were excluded. The ballot was their immediate and obvious need. In the absence of disenfranchisement, would the racial mix in politics have been statistically "balanced"? Can quotas be justified as part of an effort to create artificially that mix which would have evolved naturally under more auspicious circumstances? In the schools, perhaps, but not in government. Political offices are not equivalent to seats in a classroom. Groups in our society have never been politically represented in proportion to their size. The Irish have been "overrepresented," Jews were long "underrepresented." Culture and experience—not simply discrimination—have accounted for such differences. Nor does proportional racial representation in voting have anything in common with admissions to desirable educational programs. There is no barrier set to voting, as there is by selective admissions. And one vote has the same value as any other.

Not only is the principle of proportional racial representation difficult to justify; it is impossible to implement. Thus the drawing of district lines to maximize black representation does not guarantee racial proportionality. While racial balance in schools can be attained (more or less) through racially conscious seat assignment, that same balance in politics cannot be achieved by the assignment of citizens to wards.

One case in particular, *Whitcomb v. Chavis* (1971), is often cited as proof that the Supreme Court recognizes the limits of proportional racial and ethnic representation as a standard by which to measure political equity. But *Whitcomb* is a perfect example of the depth of the Court's commitment to a principle it appears to spurn.

The issue in *Whitcomb* was the representation of Indianapolis blacks. The entire county in which the city was located had been reconstituted as one large multimember district. That change, blacks asserted, unconstitutionally diluted the effectiveness of the minority vote. But the Court held that disproportionate racial representation did not alone prove discrimination. Rather, the Court said, blacks had aligned themselves with the wrong political party. They had insisted upon being Democrats in a city in which Republicans most often won. Political choice had distorted the racial and ethnic balance of legislative seats.

The effect of *Whitcomb* was to assign to courts the impossible task of distinguishing those elections which are racially "clean" from those which are "tainted." Except in cases of persistent and obvious racial-bloc voting, how can a court determine the impact of race on elections? How can it know when the racial identity of candidates or voters and not political issues has determined the outcome of an election? The link between race and politics is often close. If the Democratic Party is perceived as the party of blacks, does that perception help or harm the Democratic vote? How can the court find out?

Despite these difficulties the Court insisted that in situations which are racially "tainted," proportional racial representation—in practice, ward voting—is the standard by which to measure electoral equity. Where black political power is reduced by racial hostility, at-large districting impermissibly dilutes the black vote.

The standard of proportionality was thus indirectly reaffirmed in a case often cited as evidence to the contrary. By the imposition of ward voting, the District Court of the District of Columbia and the Department of Justice are attempting to accomplish for certain minorities what only a very different political system could truly guarantee. How can the creation of single-member districts solve the problem of blacks or Chicanos who side with a losing party? Even the most careful drawing of ward lines does not guarantee the representation of minorities in proportion to their size. Proportional racial and ethnic representation is a dubious end, and single-member districting an inadequate means.

Territorial annexations

Just how far the courts and the Justice Department are from discarding proportionality or questioning the efficacy of ward voting is demonstrated by three decisions involving territorial annexations. The city of Petersburg, Virginia, like all political subdivisions in that state, is required under section 5 to clear changes in voting procedure with the Federal government. In 1971 it petitioned the Attorney General for approval of an annexation. The pre-annexation population of the city was 56 percent black, 44 percent white. The city's seven-member governing body was elected at-large. Although 7,000 whites and few blacks were added to the city as a result of annexation, blacks and whites alike supported it. Blacks constituted a majority before annexation, and a minority afterwards (47 percent), yet it was generally agreed that the city needed to expand its tax base and enlarge its potential for economic growth. In fact, the annexation ordinance was originally introduced by one of the two black members of the City Council; adoption was unanimous. Nothing about the annexation indicated racial purpose.

After the annexation, a black member of the council presented a proposal to have members of that body elected from single-member districts; it was turned down. At-large voting was traditional in the city, and considered to have some advantages.

Nevertheless, the Justice Department ruled against the city. The reduction in the voting strength of blacks, it said, had a discriminatory effect on voting rights within the meaning of section 5. Congress, it conceded, did not intend for all Southern cities to be prevented from annexing territory. But by maintaining the at-large system in the context of a shift from a black to a white majority, the city wrote into the Petersburg election law "the potential for an adverse and discriminatory voting effect."

The D.C. District Court concurred. It allowed the annexation, but required Petersburg to adopt a ward system of voting. Although the purpose of the annexation, it said, was not racial, the city had had a long history of racial discrimination. While white numerical domination in the mid-1960's had not prevented the election of black councilmen, nevertheless the races had long been polarized and racial bloc voting was the norm. The City Council had always had a majority of white members and had, the court said, been "generally unresponsive to some of the expressed needs and desires of the black community." It had "on some occasions rejected or failed to adopt programs, employment policies, and appointments recommended by blacks." The fact that few city employees were black gave substance to the charge that it was a city run by whites for whites.

Yet a ward system would provide little relief. If district lines were drawn just right, the number of black representatives might increase. That increased representation would provide greater opportunities for patronage. Blacks might secure those "appointments" to which the decision elusively referred. But as long as racial bloc voting persisted, black councilmen would remain in a minority, and those "programs" to which the decision also alluded would have no greater chance of passing. The assumption that runs through these decisions—that equality at the electoral level will produce equality at the legislative level as well—is unfounded. Rearranging electoral districts to equalize legislative seats, even when successful, will not necessarily produce legislative programs of equal benefit to all. Blacks may gain their statistically equitable proportion of seats without gaining a comparable proportion of legislative benefits.

The courts and the Justice Department seem to believe that ward systems universally benefit minorities, but the blacks in Petersburg might have fared even better with a council elected at large. The city was almost half black. In an at-large system every councilman would have had black constituents. With minimal energy and organization those constituents could have made their presence felt.

Political conditions obviously vary from city to city. And the degree to which single-member districts in any one city will actually benefit a minority is unpredictable. In part, those benefits depend upon the skill with which district lines are drawn. The Department of Justice and the D.C. District Court focus on the dangers of lines drawn to disperse black votes and reduce black power. But the black vote can be diluted, as well, by excessive concentration. Votes can be wasted as well as ignored.

Neither the D.C. court nor the Justice Department, in other words, can be certain that one electoral arrangement is superior to the other. And the cost of judicial and executive interference into local electoral arrangements is considerable. When the Federal government intervenes in local electoral arrangements—when it attempts not simply to augment political opportunities but also to shape electoral results—it deprives citizens of their right to achieve through conflict and conciliation those electoral arrangements most suited to their needs.

Decisions such as *Petersburg* have an additional consequence: They create incentives to keep a city ghettoized. Once a ward system is instituted, the geographical dispersion of blacks cuts into black power. How many individuals would actually base a housing decision on such political considerations is, of course, difficult even to speculate about. Nevertheless, courts have often argued that residential segregation is the responsibility of school boards, since decisions establishing school-construction sites mold neighborhoods. It is certainly as plausible that area-based political machines help to shape a city. The courts, by rulings such as *Petersburg*, lend their weight to the cause of those who envision American society as deeply and permanently divided along racial and ethnic lines.

A further difficulty is that the courts and the Justice Department impose ward voting without making clear the precise circumstances which compel their decision. What if blacks had retained a slim majority in post-annexation Petersburg? And when single-member districts are required, where must district lines be drawn? In reviewing reapportionment in New York after the 1970 census, the Justice Department demanded that district lines in the Williamsburg section of Brooklyn be redrawn to give blacks and Puerto Ricans a 65 percent majority: Because the turnout of minority voters was low, the 61 percent given under the proposed reapportionment plan was found wanting. In other words, the Attorney General made the bizarre assumption that if an ethnic group has a history of low voter turnout, it is necesary to draw district lines in such a way as to increase the concentration of that group! Apparently the whole political system had to be adjusted to take account of that transitory social fact. And if minority turnout increased to the point that minority votes were being "wasted," would the system then require further readjustment?

The inevitable confusion over the when and where of district lines has been further compounded by two decisions involving the annexation of a suburban area by the city of Richmond, Virginia. The annexation in *Petersburg* was indisputably motivated by economic considerations. But race lay behind Richmond's decision to incorporate surrounding territory—or at least that is what the District of Columbia court alleged. Judge Skelly Wright said that whites had attempted to sustain waning power through the addition of more white voters.

The Richmond story

Voting in Richmond had been at large. After the annexation the city proposed a ward plan, in hopes of complying with the principle established in *Petersburg*. But a ward plan, the court ruled, cannot save an annexation which is racially motivated, since the Voting Rights Act prohibits the purposeful dilution of the black vote. "To convince a court that such a city . . . has purged itself of a discriminatory purpose," wrote Judge Wright, ". . . it would have to be demonstrated by substantial evidence . . . that the ward plan not only reduced, but also effectively *eliminated* the dilution of black voting power caused by the annexation." (Emphasis mine.)

The only plan which could possibly "eliminate" that "dilution" would be one guaranteeing to blacks the level of power they had previously possessed. The court did not specify, however, whether that level would be the number of seats to which blacks were actually elected, or that which a ward plan without annexation would have given them. But the principle was clear: Annexations which are racially motivated cannot be permitted to dilute the political strength of blacks. Under such circumstances, blacks are entitled to representation not simply in proportion to their present numbers, but in proportion to what those numbers were prior to annexation.

There was a certain logic to preventing a city with a long Jim Crow history from duplicitously shoring up waning white power, if indeed that was what it was doing. But the principle formulated by Judge Wright was unworkable and indefensible. It made annexation conditional upon a fixed balance of power and in effect established a political quota system that guaranteed blacks a permanent right to a certain proportion of the seats in city government. Implementation of the principle was left to a district court in Virginia, one more familiar with Richmond politics.[3]

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[3] Ironically, the struggle over annexation took place at the same time that the city was grappling with the problem of school integration. The local district court ordered the consolidation of the Richmond school district with that of two surrounding counties. While one Federal court looked for ways to reduce the effect on black voting power of the addition of more whites, another searched for a method to add more votes for purposes of school integration!

In fact, Judge Wright had alluded to the option of de-annexation, but by the time the court ruled, the annexation was more than four years old. Moreover, there was some reason to think that blacks actually favored annexation, although Judge Wright conveniently relegated to a footnote evidence of such support. Yet the issue was obviously crucial. Perhaps blacks in Richmond, as in Petersburg, did not regard black numbers as the necessary solution to their economic and political woes. While the court was convinced that the City Council had been unresponsive to black needs and equated that lack of responsiveness with white domination, apparently blacks saw the situation as more complicated.

Undoubtedly, some Richmond whites welcomed the addition of more white voters through annexation, but the motives of even the most racist among them must have been mixed. Annexation made economic, as well as educational, sense. Several months ago, *The New York Times* described the city as beginning to suffer from Northern-style urban pains. "It is becoming blacker, poorer, and older," the *Times* said. The inner-city population has been falling almost 2 percent annually, half the residents are black, the school system has an 80-percent black enrollment, and unemployment exceeds 15 percent in many black sections. The *Times* described the annexation as an effort both to slow white flight and to expand an inadequate tax base. The effort failed; but had it succeeded, the city's new black mayor would be facing far fewer problems. As the situation now stands—and as the mayor has made clear—only the cooperation of the white business elite can prevent further decay.

Not even annexation, then, could preserve the political and economic status quo. Neither the citizens by territorial means, nor the Federal government by judicial ones, could stop the city's demographic, economic, and political change.

The D.C. District Court's decision did not last long. In 1975 it was overturned by the Supreme Court in an opinion which argued that the ward plan already adopted would suffice. Blacks, the Court said, were not entitled to any absolute number of seats, but only to a number proportionate to their current strength.

Adding language to [illegible]

The principle of proportional racial representation could have been repudiated by Congress. Richmond provided the perfect opportunity for legislative redefinition of the act. The Supreme Court decision was handed down in June 1975. The act was due to expire in August, and hearings on its extension had been underway since late February. But judicial decisions seem to encourage not contraction but expansion of legislative scope. When the Court embellishes the original meaning of a piece of legislation, the new interpretation becomes a tool for those in Congress who favor even greater change. Thus the act's 1975 extension resulted in both a reaffirmation of the principle of proportionality, and the addition of amendments which greatly enlarged the scope of the law. The 1965 act had protected all citizens denied the right to vote on account of race or color. And since it was based on the Fifteenth Amendment, essentially that meant blacks. In 1975 protection was extended to four specifically designated "linguistic minorities": American Indians, Alaskan Natives, Asian-Americans, and citizens of Spanish heritage.

As in the original act, coverage in the 1975 extension was triggered by the existence of a test in areas with a registration or turnout of less than 50 percent. And coverage meant not only suspending those tests, and providing Federal registrars where needed, but the necessity for states and localities to "preclear" all changes in electoral procedure, including annexations and apportionments. Moreover, the definition of a "test" was broadened. Under the 1975 legislation, ballots printed in English were considered a "test" when used in a jurisdiction in which more than 5 percent of the citizens of voting age were members of one of the designated minorities. And the "suspension" of such a test involved the provision of bilingual ballots.

One provision in the 1975 amendments had no counterpart in the 1965 law. Originally the Voting Rights Act covered only those jurisdictions in which a low level of political participation indicated a history of discrimination. But Congress concluded that bilingual ballots were often needed in areas in which voting turnout exceeded 50 percent. The amendments therefore made the provision of those ballots mandatory wherever linguistic minorities with an illiteracy rate higher than the national average resided. Thus a host of counties in California, Colorado, and elsewhere came under partial coverage. They were expected to provide bilingual ballots and other instructional material, but were not subject to other provisions such as preclearance of changes in their electoral laws.

The coverage of these "linguistic" groups compounded the problems already inherent in the act. To the difficulty of guaranteeing maximum electoral effectiveness to blacks was added that of ensuring equal effectiveness to American Indians, Alaskan Natives, and those Asian-American and "Spanish heritage" groups that the Justice Department, in implementing the act, designated as having been "effectively excluded from the electoral process." This category includes: Filipinos, Chinese, Japanese, and Koreans; persons of Spanish surname in Arizona, California, Colorado, New Mexico, and Texas; persons whose mother tongue is Spanish in 42 states; and Puerto Ricans in New York, New Jersey, and Pennsylvania.

These were groups without a history of disenfranchisement comparable to that of Southern blacks. No test designed to disenfranchise citizens of a particular race had kept them from the polls in recent decades. But the Department of Justice, implementing Congressional intention, concluded that they had been sufficiently disadvantaged by the absence of bilingual election material so as to warrant Federal protection. A "test" of disproportionate ethnic impact (inability to read English was assumed), when coupled with low voter turnout, became the trigger which entitled this odd assemblage of groups to the political privileges created and protected by the Voting Rights Act.

What can explain the passage of these amendments? And why did they take the form they did? For one thing, the inclusion of "linguistic" minorities quieted the customary Southern opposition. "We feel the same way about this as we do about busing," one Louisiana Representative remarked. "Let them stew in their own juice up there." Two Alabama Congressmen publicly endorsed the bill. But though the taste of revenge was sweet, more important was the simple recognition of political realities: By 1975 a quarter of the voters in the seven Southern states covered by the act were black. The expansion of the act would ensure its renewal and blacks wanted it renewed.

Outside the South, too, opposition was muted. The enthusiasm of the North and West in 1965 and 1970 had cost those regions nothing politically, but the amendments proposed in 1975 affected almost every state. Yet the issues were scarcely debated. This was in part because no legislation was more important to the black community, in part because civil rights in general had become a privileged issue and sheltered from political discourse. And in part it was because by 1975 there had developed a remarkable consensus that group effectiveness was the real measure of political equality.

Republican Representatives M. Caldwell Butler and Charles E. Wiggins proposed amendments that would have released jurisdictions from the provisions of the act when they achieved a high percentage of persons registering or voting. The Butler proposal allowed a political unit to bail out as soon as either registration or turnout reached 60 percent. Wiggins wanted release tied directly to the level of black participation. Black turnout would be examined after each Congressional election, and no jurisdiction in which the black vote was over 50 percent would be covered. But both proposals were roundly defeated. The states and counties that fell under the act because of low voter turnout in 1964 were still to be covered after 1975.

The consensus on maintaining supervision over the Southern states went beyond Congress, of course. In the press there was widespread support for the amendments. The view of a *Washington Post* staff writer was characteristic: "Civil-rights lawyers," he wrote, "agree that the law is tough but say that is its beauty—that blacks are protected from sophisticated techniques like racial gerrymanders of election districts that can rob them of voting power just as surely as a gang of klansmen hanging around a voting booth." The equation between terrorism and redistricting did not seem to raise any eyebrows.

The consensus on the need to protect political effectiveness—and the sanctity which enveloped the act—gave a very free hand to the House Subcommittee on Constitutional and Civil Rights, where the amendments were drafted. And it was a committee ready and willing to use that freedom—ready to demonstrate, as New York Representative Herman Badillo put it, that the spirit of the 1960's was not dead.

To help Badillo demonstrate the vitality of that spirit were Chairman Don Edwards of California and Congressman Robert Drinan of Massachusetts. Off the committee, but equally involved, were Texas Congresswoman Barbara Jordan and California Representative Edward Roybal. It was a powerful group, ably supported by a skilled and committed staff, and it was likely to get what it wanted.

The Mexican connection

At the outset what it wanted was quite limited. Initially, the intention was to extend the act to cover Mexican-Americans in southwest Texas, affording them all the protections of the act, including section 5 on preclearance of changes in electoral procedure. The practice of the Justice Department in implementing the act had been to treat Indians, Puerto Ricans, and Mexican-Americans as racial groups, with the result that Mexican-Americans in states that required literacy tests were covered. But Texas had had no such test in 1964, and was therefore exempt from the provisions of the entire act!

Yet even without the barrier of a test, the Mexican-American registration rate in Texas was low. Precisely how low was difficult to tell, for the figures are distorted not only by the inclusion of aliens, but by the problem of age structure. (The percentage of Mexican-American citizens below the voting age is much greater than that of old-stock whites.) Nevertheless, it was estimated that the registration rate was approximately 46 percent. In the 1972 elections, 38 percent voted. Witnesses pointed out that Mexican-Americans comprised 10.7 percent of the elected officials in Texas, but 18 percent of the population.

These Mexican-Americans, however, could not be covered easily. The 1965 act had been based on the Fifteenth Amendment. It protected against denial of the right to vote on account of race or color. While in the view of the Justice Department, Mexican-Americans constituted a separate race, in the view of Herman Badillo (among others) they did not. In 1965 Attorney General Katzenbach had suggested that since every person had a race or color, everybody would be covered. But fortunately that view was not widely accepted. In the 1975 hearings, the Department of Justice, with mock-scientific accuracy, testified that in 1921 the population of Mexico had been 10.3 percent white, 29.2 percent Indian, and 60.5 percent mestizo, that the present breakdown was roughly the same, and since the vast majority of Mexicans were either part Indian or part black, Mexican-Americans could be said to be racially distinct. But the fact remained that the Census Bureau considered the Mexican-Americans to be white, and that Herman Badillo and others still considered it a mark of opprobrium to be classified as non-white. In the end, therefore, the arguments of the Justice Department fell on deaf ears. In any case, officially designating Mexican-Americans as a race would not have resulted in their coverage, but would merely have eliminated any need to refer to a "linguistic" minority. Actual coverage required a new trigger—one which did not depend upon the presence of a literacy test.

A dual solution was forged. The issue of race was dodged, and the base of the act was broadened to include the Fourteenth Amendment, as well as the Fifteenth. Including reference to the Fourteenth Amendment—with its equal protection clause—allowed the coverage of groups disenfranchised by reason of their national origin. At the same time, the meaning of the term "test" was expanded to include the use of English-only electoral materials, thus extending coverage to states without traditional literacy tests. This solution not only obviated the problem of defining race, but by retaining the link between a "test" and low voter turnout—the latter being an indicator of the discriminatory effect of the former—it avoided a return to the pre-1965 need to examine the intentions or actions of individual registrars.

But if some problems were avoided, others were created. A ballot in English is not the same as a literacy test designed to disenfranchise citizens of one race. English-only electoral materials do not discriminate against a racial or ethnic group as such.

There are practical problems as well. How is one to identify accurately citizens who are illiterate in English but literate in some other language, and therefore need foreign-language ballots? Attorneys in the voting section of the Justice Department use the Census Bureau's mother-tongue data, which tell the language spoken in the household in which the person grew up. But for the purpose of identifying those who are illiterate in English, the data are quite unreliable. Based on only a 15 percent sample, and including aliens as well as citizens, it assumes (contrary to fact) that second and third generation immigrants know only the language of their parents. Information on usual language spoken would be much more reliable, and indeed since 1975 the Census Bureau has been able to provide such information. But it would be *politically* much less useful. The 1970 census lists 43 million Americans as having a foreign mother tongue. Yet quite a different picture emerges when one looks at the figures for usual language. By that measure, only 1.1 million persons of Spanish heritage know only Spanish. Another 2.9 million are bilingual, but consider English their second language. Only 2.2 million describe themselves as having "difficulty in English." The total unreliability of the mother-tongue data is indicated by one more startling figure: Only 17 million Americans list themselves as competent in a foreign language—and that figure includes those who learned that language in school, as well as aliens!

The most serious problem, however, was not the inclusion of a significant number of individuals who were perfectly fluent in English, but the inclusion of groups who made no claim of discrimination. Ethnic identity, linguistic inability, and disenfranchisement were equated. Yet no one believed that any European group was actually the victim of discrimination. The assertion that English-only electoral materials by themselves so discriminated against certain groups as to warrant the extraordinary protection of the Voting Rights Act was nothing but a convenient pretense. No one wanted any special protection for recent Italian immigrants, for example, even though the number of Italians who do not list English as their usual language is only slightly smaller than that of Asians—593,000 Asians in 1975, compared with 447,000 Italians.

The solution arrived at was unprecedented and extraordinary: *Congress simply designated four groups as deserving, and excluded all others.* The 1965 legislation protects *all* citizens denied the right to vote on account of race or color. But the 1975 protection against disenfranchisement on the basis of language extends to *certain* citizens only: Alaskan Natives, American Indians, Asian-Americans, and those of Spanish heritage.

If four groups could be so designated, why not one group? The original focus of concern was the Mexican-Americans in Texas. Why such a broad-gauged, roundabout, and problematic solution to such a geographically and ethnically confined problem?

In part, political considerations dictated the coverage of groups other than Mexican-Americans. It was difficult to stop once the line from black to brown was crossed, and there was pressure to include other groups. But equally important were the constitutional problems inherent in simply designating one group to be covered but not enunciating some larger principle. Equal protection demands that in conferring legislative benefits upon only certain persons, great care be taken to demonstrate the relationship between remedies and wrongs. The selection of one group for preferential treatment is constitutionally suspect unless that treatment is related to actual deprivation and perceived social needs. That is why the 1965 legislation did not name blacks specifically, but referred to citizens denied the right to vote on account of race, and why, with regard to the Mexican-Americans, the formulation of some wider principle was necessary. Once that larger principle of linguistic disenfranchisement was established, however, other groups seemed logically to qualify.

Yet the logic was strained. Consider Asian-Americans: No evidence was offered at the hearings as to their political oppression, and such evidence would have been hard to come by. Japanese-Americans are among the most successful of all American ethnic groups. They suffer no discrimination at the polls. Nor do Chinese, Koreans, or Filipinos. Census information for the Japanese and Chinese is illuminating. Less than 15 percent of white Americans of native parentage were college graduates in 1970. For second-generation Chinese-Americans the figure was 27.4 percent, and for second generation Japanese-Americans 18.6 percent. Median family income of second-generation Chinese-Americans was 29 percent higher than that of old-stock whites. The figure for Japanese-Americans is even higher: 41 percent above the norm for native whites of native parentage.

Over-inclusion might appear harmless. No deprivation would seem to result from designation. But section 5 makes the inclusion of superfluous groups far from socially benign. The presence of these linguistic groups, in the context of low voter registration or turnout, establishes coverage—and once a political subdivision is covered *every* change in voting procedure must be submitted for clearance.

Between 1975 and 1977 there were 2,000 such submissions. Most, it is true, involved innocuous electoral changes that were immediately cleared. But a significant number, involving annexations, reapportionments, changes from ward to at-large voting, changes in the method of filling a public office, and so forth, were not. Precisely how many conflicts developed is difficult to tell, for disapproval usually results not in litigation, but in negotiation. That is, the voting section of the Civil Rights Division suggests ways in which the electoral arrangement can be altered to secure approval. Such off-the-record negotiations have become the heart of the enforcement procedure. For example, they lay behind the alteration of district lines in the Williamsburg section of Brooklyn, New York. Only when these negotiations break down, as they did in Richmond, does litigation commence.

Through this informal negotiating process, the Department of Justice has become the national arbiter of political conflicts involving racial and ethnic groups. Across the nation, in districts in California, Arizona, Colorado, Hawaii, Alaska, New Mexico, and New York, in addition to the South, the voting section is engaged in adjusting local electoral arrangements in order to augment the power of certain groups and diminish that of others.

A continual arriving

The Voting Rights Act was a noble response to the callousness of those who for so long permitted and perpetuated the disenfranchisement of Southern blacks. And its accomplishments have been very real: The old political order has crumbled in the South. Politics is no longer a lily-white preserve.

But not everything that has resulted from the passage of the act has turned out so well. The transformation in the meaning of political equality—the movement from equal opportunity to equal result—cannot be so simply celebrated. Congress, the courts, and the Department of Justice have taken a course that is frequently ineffective and always dangerous. The effort to maximize the political effectiveness of a variety of ethnic and racial groups, even when ultimately successful, is always costly. Proportional racial and ethnic representation inevitably becomes the standard by which to measure that effectiveness, and so citizens become classified for political purposes along racial and ethnic lines. There develops an acquiescence in separate politics for separate racial and ethnic groups, which are then arranged in a hierarchy with those designated for coverage placed at the top.

And the problem of costs is compounded by that of ineffectiveness. Williamsburg is a good example. Buying votes or stuffing ballot boxes works, but the drawing of ward lines cannot fix an election. In order to ensure the selection of a black, the Justice Department forced New York to redraw district lines. But factional strife, both within the black community and between blacks and Puerto Ricans, resulted in the election of a white. The underrepresentation of minorities may be a problem, but we have no reliable remedy, and those we attempt to provide don't come free.

Even where an increase in minority representation has been successfully engineered, the power of minorities may remain exceedingly limited. Such limitations were recognized in Petersburg, where blacks joined whites to choose economic growth over black numerical strength, and are even more apparent in those communities in which minorities are truly in the minority. Neither at the local, state, nor national level will a few more Mexican-American representatives get for the Mexican-American community what it needs most: legislation benefitting the poor. Political alliances are necessary—alliances based on class, rather than race or ethnicity. But the implementation of the Voting Rights Act may be decreasing the possibility of such ties. The political polarization of the society along racial and ethnic lines may be its main accomplishment. In the view of those who have modified and implemented the Voting Rights Act, separate politics for separate racial and ethnic groups appears to have become the norm. Yet if our aim is to create one society—not two or four or twenty—is this the direction in which we want to go?

That direction, it is often asserted, is only a temporary one. When the problem disappears, the act will expire. But the act itself is creating a host of new problems. Moreover, it seems well on its way to becoming a permanent part of our political landscape. How would we know when political success had been attained? We have no measure of political arrival. Those who implement the act now use the standard of racial and ethnic proportionality to assess electoral equity. But proportionality is a destination we shall never reach. We shall always be arriving and never there.

The act is due to expire in 1982, but there is no indication of any lessening of enthusiasm for it. The feeling is widespread, as one advocate recently put it, that "governmental units should not do less than is open to them." Until that feeling changes, and until we arrive at a definition of political equity for racial and ethnic groups that once again focuses on access, and foregoes the temptation to secure maximum effectiveness, the Voting Rights Act will be here to stay.

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110 Years of Voting Rights Legislation

Although it is the best known legislation on voting rights, the 1965 Voting Rights Act (PL 89-110) was not the first law enacted in this area.

The 15th Amendment to the Constitution, ratified in 1870, provides that neither the federal government nor any state can deny the right to vote because of race, color or previous condition of servitude. In 1870 and 1871, Congress enacted two laws designed to enforce voting rights under the amendment, but both proved ineffective and by 1894 they were largely repealed.

In 1957, 1960 and 1964, Congress passed laws providing the right to file federal lawsuits to challenge alleged voting discrimination. The 1960 law also authorized federal courts to appoint referees to help blacks register. In 1964, the 24th Amendment, which outlawed the use of the poll tax as a prerequisite to voting in federal elections, was ratified. *(Background, 1965 Almanac p. 536)*

Civil Rights Battle of 1965

Despite enactment of these laws, blacks in some states still were denied the right to vote, either through administration of a stiff literacy test or, if they appealed to the courts, through drawn-out litigation.

By 1965, civil rights groups determined it was time to secure greater black registration. They picked Selma, Ala., as the focus of their efforts.

With the Rev. Martin Luther King Jr. in the lead, peaceful marches attracted public attention. But three violent episodes between Feb. 18 and March 9, 1965, aroused even greater public sentiment. Two of the incidents resulted in deaths and on March 7, state troopers, acting on orders of Gov. George C. Wallace, used tear gas, night sticks and whips to halt a march from Selma to Montgomery, the state capital.

Across the United States, people reacted with outrage as they watched news accounts of the event. Ten days later, President Lyndon B. Johnson submitted his voting rights proposals to Congress, and within five months — on Aug. 6, 1965 — the Voting Rights Act (PL 89-110) was signed into law.

Supporters did not have an easy time pushing the measure through Congress. It took 25 days of debate in the Senate, with 27 roll-call votes — one of them to break a filibuster launched by Southern opponents. In the House, backers had a five-week struggle to get a Judiciary Committee bill out of the Rules Committee. When the bill finally came to the floor July 6, three days of debate were required to pass it.

Controversial Provisions

The act's major provisions are still in force, and remain as controversial in 1981 as they were in 1965.

One of these is the triggering formula that determines what states would be covered by Section Five, the pre-clearance provision that requires federal approval before any changes can be made in a state or local election law. A covered state or county has to show that the proposed change would not have a discriminatory effect.

Under the 1965 triggering formula, a state or county was brought under the act if it had a literacy test in effect on Nov. 1, 1964, and if less than 50 percent of its voting-age residents were registered to vote on that date or actually voted in the 1964 presidential election.

Covered areas could get out from under the act after five years by obtaining a judgment from a District of Columbia federal judge declaring that they had used no literacy tests or similar devices since 1965.

1970 Extension

The act was extended in 1970 (PL 91-285) for another five years after supporters turned back Southern senators' efforts to dilute key provisions.

States and local governments were forbidden to use literacy tests or other voter-qualifying devices through 1975 and the triggering formula was altered to apply to any state or county that had a literacy test and where less than 50 percent of the voting-age residents were registered on Nov. 1, 1968, or voted in the 1968 election.

Under the 1970 law, the pre-clearance requirement applied to those areas affected by the 1965 law and 10 more three Alaska districts; Apache County, Ariz.; Imperial County, Calif.; Elmore County, Idaho; Bronx, Kings (Brooklyn) and New York (Manhattan) counties, N.Y., and Wheeler County, Ore. *(1970 Almanac p. 192)*

1975 Extension

When the act came up for renewal in 1975, backers successfully pushed for another extension, this one for seven years (PL 94-73). *(1975 Almanac p. 521)*

The triggering formula was amended to bring under coverage of the law any state or county that was using a literacy test in 1972 and where less than 50 percent of the citizens eligible to vote had registered as of Nov. 1, 1972. Two other major provisions were added to give greater protection to certain language minorities, defined as persons of Spanish heritage, American Indians, Asian Americans and Alaskan natives.

The federal pre-clearance provisions were expanded to apply to any jurisdiction where:

- The Census Bureau determined that more than 5 percent of the voting-age citizens were of a single language minority.
- Election materials had been printed only in English for the 1972 presidential election.
- Less than 50 percent of the voting-age citizens had registered for or voted in the 1972 presidential election.

These amendments significantly expanded coverage of the act, bringing in all of Alaska, Texas and Arizona and selected counties in California, Florida and several other states.

In addition, provisions were added requiring bilingual elections through Aug. 6, 1985, if the Census Bureau determined that 5 percent of a jurisdiction's voting-age citizens were of a single language minority and the illiteracy rate in English of the language minority was greater than the national English illiteracy rate. Illiteracy was defined as failure to complete the fifth grade.

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THE LEGAL STATUS OF LOCAL AT-LARGE ELECTIONS: RACIAL DISCRIMINATION AND THE REMEDY OF "AFFIRMATIVE REPRESENTATION"

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Introduction

On October 21, 1976, United States District Court Judge Virgil Pittman, in Bolden v. City of Mobile, Alabama,[1] ruled that Mobile's plan for electing a three-member city commission at-large violated the rights of black residents under the equal protection clause of the Fourteenth Amendment. Specifically, Judge Pittman found that the at-large scheme in Mobile "precludes a black voter from an effective participation in the election system" and "results in an unconstitutional dilution of black voting strength."[2] The court's remedy called for a mayor-council plan with nine councilors to be elected from wards and the mayor at-large to replace the at-large commission. Less than two months later, acting in the case of Brown v. Moore,[3] Judge Pittman struck down the at-large election format for the Mobile County Board of School Commissioners--again on grounds of impermissible dilution. The judge ordered the institution of a plan for the election of school commissioners from single-member districts.

On March 29, 1978, the United States Court of Appeals for the Fifth Circuit affirmed the holding of the district court in Bolden[4] and, on July 2, 1978, affirmed the Brown decision in a per curiam opinion.[5] The Supreme Court has granted certiorari to both cases, which were joined for oral argument on March 19, 1979. The Court has scheduled reargument for October 29, 1979.[6]

These two cases provide the Supreme Court with a clear opportunity to endorse or reject the notion that at-large elections for a local governing body may, in the circumstances of a particular case, abridge the voting rights of a racial minority in violation of the Fourteenth and Fifteenth amendments. Should the Court specifically address this issue, it will have done so only after more than six years of judicial invocation of the doctrine in the Fifth Circuit. Already federal courts in the Fifth Circuit, applying the dilution concept, have held at-large elections unconstitutional in such localities as Dallas, Texas; Montgomery County, Alabama; Albany, Georgia; and Pensacola, Florida.[7]

The growing list of cases testing the constitutionality of at-large elections for city and county governing bodies raises a host of troubling and complex issues. In the context of representational theory, the dilution cases renew the debate concerning the relative merits of at-large versus ward-based elections. The dilution cases, as with the state and congressional apportionment cases of the 1960s, pose the question of whether the federal courts are a proper forum for resolving conflict among competing theories of democracy. And the far-reaching remedy of the district court in the City of Mobile bears on the controversy regarding the "imperial judiciary."[8] Further, the usual consequence of successful dilution cases--the substitution of single-member districts for at-large elections in order to enhance the opportunities of a minority to elect candidates of its own race--heightens concern about the use of race-conscious remedies by government generally and federal courts in particular.

The following analysis briefly treats the history of at-large elections and the general problem of minority representation under at-large schemes. The principal portion of the analysis traces the development of unconstitutional dilution as a legal concept and considers its application in specific cases. The pair of Mobile cases now up for review by the Supreme Court receive special attention. The discussion of the dilution cases touches upon, but does not resolve, the important issues noted above.

At-large Elections and Minority Representation[9]

The Progressive movement of the early twentieth century promoted a package of reforms designed to break up urban political machines, end the petty provincialism of ward-based city and county governments, and establish honest and administratively effective local governing authorities. The package included the council-manager plan of government, nonpartisan elections held separately from state or national elections, and at-large elections. The adoption of at-large elections, in the eyes of reformers, would eliminate a variety of evils associated with ward elections, including the style of representation according to which council members spoke for the narrow interests of their respective neighborhoods. In the minds of reformers, ward-based elections constituted the foundation of machine politics and, in addition, raised the specter of gerrymandering. At-large elections, by requiring candidates for local governing bodies to run citywide or countywide, presumably would produce representatives sensitive to the general needs of the community rather than the particularistic demands of wards.[10]

The widespread use of at-large elections by municipal governments, and the attendant adoption of other elements in the reform package, testify to the success of the Progressive effort to restructure local government. About 69 percent of all cities use at-large elections, while the remainder employ either ward elections or mixed ward and at-large schemes.[11] (Three-fourths of all cities employ nonpartisan elections and about 47 percent are under council-manager government.)[12]

While Progressive reformers argued for at-large elections in terms of public interest, practical political considerations also motivated their quest for the abandonment of ward elections. Historians of the period have noted that in many cities in the early 1900s, upper-class, business-led reformers regarded at-large elections as a device to reduce the influence of working class and ethnic neighborhoods which found expression through ward-based elections.[13]

The philosophical case for at-large elections is a reasonable one, but contemporary criticisms of the format continue to emphasize the class and racial bias attached to at-large elections. At-large elections, according to critics, lead to city and county governing boards dominated by citizens from well-to-do sections of the community. At-large elections favor candidates with the monetary resources to run expensive citywide campaigns. The at-large format also advantages candidates in the political mainstream who can count on the support of local media and political slating organizations. Finally, critics assert that at-large elections diminish the political importance of racial and ethnic minorities in city politics.[14] In a simple illustration, a racial group concentrated in several wards of a city might easily elect council members of that group under ward elections. The same group, since it constitutes only a minority of the citywide population, might go unrepresented in a city council chosen through at-large elections. A more subtle form of dilution may occur in an at-large setting when a candidate of a racial minority wins election only after moderating his appeal in order to attract support from voters among the white majority.[15]

It is important to recognize, however, that a minority candidate elected with the support of white voters in an at-large system may claim some added measure of political power and legitimacy by virtue of representing a broader constituency than he would under a ward system. Furthermore, assessment of the relative benefits of ward and at-large systems for a racial minority, as Armand Derfner notes, "involves the comparison between control over a few officials and less influence over a greater number."[16]

If racially proportional representation on local governing bodies, however, is set out as the criterion against which minority electoral influence is measured, several recent studies of American cities demonstrate that blacks, as a rule, achieve greater representation under ward systems than under at-large systems.[17] These same studies make it equally plain that at-large elections are not an absolute barrier to minority representation. Minority candidates in numerous at-large cities have won council positions, often with the aid of substantial support from white voters. Moreover, available evidence indicates the tendency for all variants of ward and at-large elections to produce underrepresentation of racial minorities, Hispanics as well as blacks.[18] Indeed, aggregating data on at-large cities or ward cities tends to mask important differences in the political circumstances prevailing in particular cities. While ward elections in general lead to greater black representation than that which emerges in at-large cities, ward elections will enhance black representation only if blacks are residentially concentrated (and politically mobilized) in one or several wards within the city. Because Hispanics, unlike blacks, are often not residentially segregated in cities, the benefits of ward elections in terms of council representation for Hispanics may be negligible.[19]

Although much of the research of political scientists has focused on the general impact of election form on minority representation, legal activity regarding at-large elections has concentrated on individual cases--in particular, the unique aspects of locality's politics which, in combination with an at-large system, may foreclose effective minority participation and representation. For example, regular bloc voting by white citizens against minority candidates (or minority-supported candidates) can minimize the influence of minority voters under an at-large format. In this regard, variations in the basic at-large scheme may strongly influence the relative effectiveness of bloc voting by either white or minority voters.

In the simplest version of at-large elections, all candidates compete for open seats on the council. If six seats are vacant, the six leading vote-getters are elected. In cities using the simple at-large plan, racial minorities often resort to the tactic of single-shot or bullet voting in order to win representation on municipal councils. (Single-shot voting refers to the practice of voting for only one candidate rather than voting, say, for six candidates for six open seats. The candidate benefiting from the single-shot is doubly advantaged: he receives a vote while other candidates are denied a vote.) The effectiveness of the single-shot tactic may be nullified by modifications of the basic at-large format, such as a requirement that winning candidates must receive a majority of the ballots cast or a stipulation that a voter must vote for as many candidates as there are vacancies to be filled--a "full-slate requirement." A rule providing that candidates must run for a specific seat or "numbered post" (seat #1, seat #2, etc.) on an at-large council and staggered terms of office also will reduce the effectiveness of single-shot voting by minority voters. Alternatively, such devices enhance the impact of bloc voting by white voters against minority candidates and, thus, reduce the likelihood of minority representation.

While provisions requiring majority vote, full slate voting, numbered posts, or staggered terms diminish the possibility of minority representation in an at-large setting, district residency requirements may enhance the responsiveness of at-large systems to minority interests. A stipulation that a candidate for a specific seat reside in a particular ward, even though the election is at-large, may raise the likelihood of minority representation.

At-Large Elections and the Voting Rights Act

Legal attacks against at-large election of local governing bodies have, of course, focused on the tendency of at-large elections to minimize the influence of minority voting strength. Such challenges fall into two separate, though related categories: (1) judicial and administrative actions under the Voting Rights Act of 1965, as severally amended; and (2) suits alleging the unconstitutionality of at-large elections under the Fourteenth and Fifteenth amendments. While the constitutional issues of the second category are the principal concern of the present analysis, some appreciation of disputes arising under the Voting Rights Act provides an essential backdrop for discussion of the Fourteenth and Fifteenth amendment cases.

Enacted to guarantee black citizens full rights of suffrage, the Voting Rights Act of 1965 applied to states and localities, principally southern, (a) employing voter qualification devices such as the literacy test and (b) recording voter registration or voter turnout under 50 percent of voting age residents in November, 1964. The act suspended voter qualification devices in covered jurisdictions and authorized federal examiners to oversee voter registration in covered areas. Section 5 of the act required covered jurisdictions to submit changes in voting laws to the Attorney General or to the U.S. District Court for the District of Columbia for approval. Congress extended the act in 1970 and brought under its coverage a few more jurisdictions. The 1975 renewal significantly expanded the scope of the act to assure the voting rights of language minorities (Spanish-heritage, Indians, Asian-Americans, Alaskan Natives). A triggering formula similar to the one contained in the original 1965 act subjected areas with a sizable language minority to coverage. These jurisdictions too now have to clear changes in voting laws under the provisions of Section 5.[20]

At present, all jurisdictions in nine states (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia) and some jurisdictions in another thirteen states fall under the preclearance provisions of Section 5.[21] Having sustained the constitutionality of the Voting Rights Act in a 1966 decision, the U.S. Supreme Court, in subsequent rulings, has interpreted Section 5 permissively to encompass virtually any change in state or local laws bearing on the conduct of elections.[22] Among the covered changes, requiring either the approval of the Attorney General or judgment of the District Court for the District of Columbia, are at-large election, majority vote provision, full-slate requirement, numbered post provision, staggered terms, redistricting of wards, and annexation. Any of these changes may encounter the disapproval of the Attorney General because of their tendency to dilute the voting strength of a racial or language minority.[23]

Challenges to at-large elections under the Voting Rights Act are limited to jurisdictions covered by the act and, more narrowly, to those jurisdictions seeking to make changes in election procedures. A proposed shift from ward to at-large elections or an attempt to impose a majority vote requirement on an existing at-large format probably would fail preclearance by the Justice Department. For example, the Justice Department denied approval to a 1968 Louisiana statute allowing local governments to utilize at-large elections in place of ward elections formerly required by state law.

However, Section 5 does not reach at-large systems already in place; nor does it permit the Attorney General to block changes which, though dilutive of minority strength in an absolute sense, improve minority access over preexisting levels. The U.S. Supreme Court clarified the limited reach of Section 5 in Beer v. United States,[24] a 1976 case orginating in an objection by the Attorney General to a councilmanic redistricting plan for the City of New Orleans. The city had in 1961 adopted a mixed system under which two councilors were elected at-large and five from wards; blacks constituted a majority of the population and about half of the registered voters in one ward. No black candidate won election to city council from 1960 to 1970. In a plan adopted after the 1970 census, the city maintained the five ward/two at-large formula, but redistricted the wards to create two with a majority black population (one with a black majority among registered voters). In light of the fact that blacks comprised 45 percent of the city's population and nearly 35 percent of its voters, the District Court for the District of Columbia had rejected both the continuation of the at-large seats and the redistricting of the ward seats as racially dilutive. The Supreme Court majority, in reversing the district court, held that the two at-large seats did not constitute a change in electoral practice and were exempt from preclearance under Section 5. Further, the Court read Section 5 as prohibiting retrogressive changes in voting procedures but not ameliorative measures. Although the redistricting of wards failed to maximize black voting strength and, in combination with two at-large seats, virtually foreclosed proportional representation, the new ward scheme did increase the likelihood of black representation on council. Thus, the ward plan did not violate Section 5. In a dissenting opinion joined by Justice Brennan, Justice Marshall argued that Section 5 embraced the prohibition of the Fifteenth Amendment against abridgment of the right to vote and also incorporated the protection against dilution contained in the equal protection clause of the Fourteenth Amendment. In Marshall's view, the ameliorative aspect of the plan was irrelevant in the face of continuing dilution.[25]

Although the Beer decision effectively proscribes the use of Section 5 as a mechanism to attack directly existing at-large systems, the application of Section 5 to municipal boundary changes provides an indirect means of assault on at-large schemes. Perkins v. Matthews,[26] decided by the Supreme Court early in 1971, held that annexation legislation fell within the purview of Section 5. Subsequently, annexations in Petersburg and Richmond, Virginia (which had occurred prior to the Perkins decision) encountered objections from the Justice Department. Extensive litigation ended in two significant rulings by the Supreme Court. In each instance, the city council sought to annex predominantly white outlying areas. The annexation reduced the black proportion of the population in Petersburg from 55 percent to 46 percent; annexation in Richmond decreased the black proportion from 52 percent to 42 percent. In 1973, the U.S. Supreme Court affirmed without written opinion a district court decision invalidating Petersburg's annexation unless the city converted from at-large to ward elections.[27] Two years later, the Supreme Court ruled in City of Richmond v. United States[28] that Richmond's annexation, when coupled with the city's recent adoption of ward elections, met the requirements of Section 5. Significantly, the Court asserted that Section 5 does not prohibit a reduction in the black proportion of the population so long as blacks are guaranteed a reasonable opportunity to elect councilors in proportion to their political strength in the newly expanded community.

The Richmond ruling, in practice, prohibits municipalities subject to Section 5 coverage from undertaking annexations and, at the same time, maintaining at-large electoral schemes. To secure Justice Department approval for annexation cities must abandon at-large elections in favor of a mixed ward/at-large plan or a pure ward system. San Antonio, for example, converted from at-large to ward elections in 1977 after the Justice Department objected that a recent annexation diluted the voting strength of Mexican-Americans and blacks.[29]

The application of Section 5 to prohibit changes from ward to at-large elections and, in annexation proceedings, the maintenance of at-large systems has affected the development of dilution suits in several important ways. First, the Voting Rights Act has created a curious legal dichotomy within covered jurisdictions. While Section 5 prevents local governments with ward plans from switching to at-large elections, localities with at-large plans established prior to the effective date of Section 5 are free to maintain them in the absence of a challenge to their constitutionality. Secondly, the fact that a jurisdiction is under Section 5 coverage may influence the judicial determination of the constitutionality of a local at-large plan (a point considered in the following sections). Thirdly, attacks on the constitutionality of local at-large schemes, on occasion, may revert to Section 5 disputes. In the Zimmer case discussed below, Section 5 considerations provided an alternative to the constitutional issues judged paramount by the United States Court of Appeals for the Fifth Circuit. The City of Houston, Texas, defeated a federal court action challenging the constitutionality of its at-large system for electing city councilors,[30] only to be forced to abandon the plan in the face of Justice Department objections to the city's annexation proceedings.[31]

Although suits asserting the unconstitutionality of at-large elections can be brought against localities anywhere in the country, virtually all significant cases have emerged in the Fifth Judicial Circuit. The Fifth Circuit includes the states of Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas--all states covered in whole or in part by the Voting Rights Act. The Fifth Circuit has emerged as the focal point for constitutional challenges to at-large elections for two major reasons: (1) the presumption that jurisdictions subject to the Voting Rights Act may use electoral devices, including at-large elections, for discriminatory purposes since they have done so in the past; and (2) the receptiveness of the U.S. Court of Appeals for the Fifth Circuit to claims that local at-large elections, under specific circumstances, are unconstitutional. Federal district and appellate courts in other circuits have shown a much greater reluctance to entertain claims of dilution,[32] but a recent case in Nebraska may signal a change in this regard.[33] The future of dilution cases inside and outside the Fifth Circuit will depend on the Supreme Court's resolution of the two Mobile cases noted here at the outset.

The Dilution Standard in the Fifth Circuit

The principal foundation for suits attacking the constitutionality of local at-large elections is Zimmer v. McKeithen, decided en banc by the Fifth Circuit Court of Appeals in 1973.[34] In this case, black plaintiffs alleged that at-large elections for police jurors and school board members in a Louisiana parish of under 13,000 population impermissibly diluted the voting strength of black residents. The facts of Zimmer make it an odd precedent for subsequent dilution cases. First, blacks actually constituted a majority (59 percent) of the parish population, although they accounted for only 46 percent of registered voters. Second, the at-large plan under attack had been imposed originally by a district court order in 1968 as the remedy for population disparities among the districts of the ward plan then in use. After the 1970 census, the East Carroll Parish Police Jury resubmitted the at-large plan to the district court, which approved it. Interestingly, the 1968 Louisiana statute permitting at-large elections for police juries and school boards was blocked by the U.S. Attorney General, acting pursuant to Section 5 of the Voting Rights Act.

Sidestepping questions about the application of Section 5 to the instant case and the appropriateness of a judicially-created at-large appointment plan, 1

the Fifth Circuit Court took on the issue of unconstitutional dilution. In establishing the standards according to which dilution might be judged, the Court relied upon the opinions reached by the U.S. Supreme Court in *Whitcomb* v. *Chavis* (1971) and *White* v. *Regester* (1973).[35] Both *Whitcomb* and *White* involved claims that multimember districts employed in state legislative apportionment plans resulted in impermissible dilution of minority voting strength. *Whitcomb* rejected the contention that ghetto blacks in Marion County (Indianapolis) suffered a denial of equal protection because "the number of ghetto residents who were legislators was not in proportion to ghetto population."[36] Both the Democratic and Republican parties regularly slated black candidates for the legislature and black underrepresentation, in the view of the *Whitcomb* majority, was attributable to the "defeat at the polls" of the Democratic slate favored by ghetto voters. The Court thus treated dilution in terms of unequal access to the political process which was not demonstrated by the facts in *Whitcomb*, and not in terms of minority underrepresentation which had been shown. In *White*, the Supreme Court upheld district court's findings of dilution in two multimember districts created by a Texas legislative apportionment plan. The practices of a white-dominated slating organization within the Democratic party largely precluded black participation in the nomination and election of legislative candidates in Dallas County. A protracted history of discrimination, particularly with respect to the franchise, and the unresponsiveness of the legislators to minority interests combined to deny Mexican-Americans in Bexar County (San Antonio) equal access to the political process.

The Fifth Circuit Court read *Whitcomb* and *White* to mean that unconstitutional dilution exists:

> . . . where a minority can demonstrate a [1] lack of access to the process of slating candidates, [2] the unresponsiveness of legislators to their particularized interests, [3] a tenuous state policy underlying the preference for multimember or at-large districting, or [4] that the existence of past discrimination in general precludes the effective participation in the election system. . . . [5] Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.[37] [Bracketed numbers have been added.]

Having set out four primary criteria plus a list of enhancing factors, the *Zimmer* Court went on to explain that all criteria need not be satisfied in a successful dilution claim. As noted in *White*, the "totality of circumstances" confirms the existence of dilution.[38] Indeed, while the Court in

Zimmer found unconstitutional dilution, the facts in evidence clearly fulfilled only two of the four primary criteria, a tenuous state policy and the persistent effects of past discrimination. The record showed no pattern of unresponsiveness by parish officials, nor were blacks unequivocably denied political access. Three black candidates for school board and police jury won election in 1971 and 1972.

The Zimmer case reached the U.S. Supreme Court in 1976 and, in a per curiam opinion, the Court affirmed Zimmer in East Carroll Parish School Board v. Marshall.[39] However, the Supreme Court relied upon the procedural rule that federal courts, in devising apportionment plans, should employ single-member districts, absent special circumstances which would justify the use of multimember districts. The Court specifically dissociated itself from the constitutional views expressed in Zimmer.

Although East Carroll Parish casts some doubt on the value of Zimmer as precedent, the Zimmer criteria have governed the adjudication of dilution challenges in the Fifth Circuit. However, a dilution case involving at-large elections for city commissioners in Albany, Georgia, produced a different constitutional foundation for dilution claims. No black candidate had won a seat on the city commission over the period 1947 to 1975, despite the fact that blacks accounted for 39 percent of Albany's population of 76,000. The creation of the at-large scheme dated to a 1947 Georgia law and followed the end of all-white primaries and the 1946 election in one ward of a white candidate who enjoyed black support. State legislation enacted in 1959 added a majority vote requirement. In 1975, a federal district court, relying on Gomillion v. Lightfoot, judged the 1947 act establishing the at-large system to be an unconstitutional abridgment of the right to vote under the Fifteenth Amendment; the court substituted a mixed plan calling for five commissioners elected by wards and a mayor and mayor pro tem elected at-large.[40]

A panel of the Fifth Circuit Court of Appeals reversed the decision of the district court in light of its reliance on Gomillion and its adoption of a mixed plan. The Fifth Circuit panel chastized the district court for its failure to apply "more recent Fourteenth Amendment precedents," specifically White and Zimmer; further, the panel noted that in cases of dilution, "Zimmer sets the basic standard in this circuit."[41] On remand, the district court made the appropriate findings of fact required by Zimmer, but refused to recognize the validity of Zimmer as precedent. Instead, the district court specifically followed Whitcomb and White in finding unconstitutional dilution under the Fourteenth Amendment and reiterated the finding of a Fifteenth Amendment violation in the 1947 act.[42] (The remedy called for six ward councilors and a mayor elected at-large.)

The reluctance of the Court of Appeals to rely on Fifteenth Amendment precedents in deciding the Albany case apparently derived from its view that such a rationale would require a showing of "racial motivation" in the enactment of the plan. The Fifth Circuit regarded the Fourteenth Amendment reapportionment cases, from which Zimmer descended, as sounder precedents.[43] The Court's view implicitly underlined the reading that reapportionment cases in general, and dilution cases in particular, required only a demonstration of discriminatory effect in the operation of the challenged plan.[44]

However, the Fifth Circuit Court itself undertook a major reinterpretation of this position on March 29, 1978, when a panel of the Court decided four dilution cases, including the City of Mobile case. In the lead case, Nevett v. Sides[45] (hereinafter, Nevett II), the panel applied a 1976 Supreme Court decision dealing with discrimination in employment (Washington v. Davis)[46] and a 1977 Supreme Court ruling on exclusionary zoning (Village of Arlington Heights v. Metropolitan Housing Development Corp.)[47] to dilution claims based on the Fourteenth Amendment.[48] Such claims, said the panel, require a demonstration of "racial intent" in the creation or maintenance of the challenged plan.

The addition of a required showing of intent to the Zimmer criteria might have transformed the nature of dilution claims,[49] for Zimmer had disavowed a concern for intent, emphasizing instead an interest in the effects of a challenged apportionment plan on the voting strength of a minority element.[50] Intent could be easily discerned in a case such as that involving Albany, where the adoption of at-large elections occurred fairly recently and in response to rising levels of black voter participation. In other cases, as in the City of Mobile case discussed below, a showing of intent would require a demonstration that an at-large plan adopted under race-neutral circumstances was maintained by legislative inaction for discriminatory purposes.[51] The panel in Nevett II overcame the potential for chaos in a standard of intent by holding that "the Zimmer criteria provide a factual basis from which the necessary intent may be inferred."[52] In the case at hand, the panel proceeded to affirm a district court's rejection of a suit alleging dilution in the at-large election of aldermen in Fairfield, Alabama. The panel in Nevett II found the record ambiguous on virtually all counts of the primary criteria of Zimmer. Blacks made up 50 percent of the registered voters in Fairfield (a city of just over 14,000 population). In 1968, blacks won six of twelve aldermanic seats and none in 1972, the latter result attributable to the failure of black voters to turn out in that election.[53]

Application of the Zimmer Criteria in Specific Cases

The use of the Zimmer criteria to assess dilution claims has led to a rather predictable pattern of findings of fact and conclusions in successful challenges to at-large systems. Under at-large schemes in question, black candidates seldom run for positions on local governing boards. Those who do run cannot win because of persistent racial bloc voting by white citizens, a practice aided by various electoral devices (i.e., enhancing factors) such as a majority vote rule and a numbered post requirement. Lack of responsiveness to minority needs appears in a record of discriminatory hiring practices, inequalities in the delivery of public services, and segregation in public facilities. Within the Fifth Circuit, most localities have a lengthy history of racial discrimination. Where, for example, black rates of registration and voting fall below the rates for whites, the lingering effects of past discrimination are evident. The presence of a tenuous state policy is seldom an important criterion, unless as in the Albany case the at-large plan has been recently enacted under suspicious circumstances.

The two Mobile cases provide clear examples of the application and satisfaction of the Zimmer criteria. In the city's case, the inability of blacks to participate fully in the political process--the first criterion--stood out on record. While blacks make up 35.4 percent of the city's population of 190,026, no blacks have ever been elected to the three-member commission and few have run. The district court noted a pattern of racially polarized voting and a climate in which seeking the support of black voters could be politically hazardous.

> One city commissioner, Joseph N. Langan, who served from 1953 to 1969, had been elected and reelected with black support until the 1965 Voting Rights Act enfranchised large numbers of

> blacks. His reelection campaign in 1969 foundered mainly because of the fact of the backlash from black support. . . . He was again defeated in an at-large county commission race in 1972. Again the backlash because of the black support substantially contributed to his defeat.[54]

The district court found the city commissioners unresponsive to the interests of the black minority. For example, blacks held only 47 positions of 482 on 46 city committees and only 15 of 435 employees in the fire department were black.[55] The court found street maintenance in black neighborhoods to be inferior to that in white neighborhoods. Under the third of the Zimmer criteria, tenuous state policy, the district court noted the longstanding commitment of the city to at-large elections which dated to 1911. Despite the removal of barriers to registration and voting, blacks still suffered from the effects of past discrimination--one bit of evidence in this regard being the persistence of white bloc voting. Enhancing factors noted under the Zimmer criteria included not only a majority vote and a place requirement, but also the absence of a subdistrict residency requirement and the large size of the city. (The cost of a "serious campaign" for city commission has been estimated to be roughly $50,000.)[56] The district court, declaring the existing at-large scheme unconstitutional, ordered the establishment of a strong mayor-council plan, with nine councilors to be elected from wards, in place of the commission plan.

In its treatment of the case on appeal, a panel of the Fifth Circuit Court of Appeals gave special attention to the city's claim that the enactment of the at-large plan in 1911 insulated it from attack as racially motivated.[57] The panel reiterated that intent could be inferred from the Zimmer criteria and, in addition, cited some direct evidence of intent in the maintenance of the at-large plan. In particular, the panel noted a 1965 act of the Alabama legislature that assigned a specific city-wide function to each position on the commission. The city sought preclearance for the act under Section 5 of the Voting Rights Act ten years later--after the dilution litigation began. The Attorney General, seeing the change as an effort to enhance the impact of the at-large system in diluting minority voting strength, rejected the change in 1976.[58] Finally, the panel approved the district court's unusual remedy and, in doing so, observed the city's refusal to offer a plan of its own.[59]

The findings in the district court's opinion in the Mobile County School Board case closely parallel those in the city's case.[60] The five-member board was elected at-large to numbered positions; a majority vote rule applied to the primary election only and no district residency rule existed. The judge also observed the large size of the county, its population exceeding 317,000, as a barrier to minority candidacies. While blacks comprised one-third of the county's population, no black had been elected to the board and voting patterns corresponded to race. The board's discriminatory employment policies and resistance to desegregation demonstrated unresponsiveness and also illustrated the continuing effects of past discrimination. The school board's at-large plan originated in 1826, and the court found no tenuous state policy behind at-large elections.

Where the findings of fact sustain the Zimmer criteria nearly point by point, as in Bolden and Brown, the judicial investigation into dilution assumes an orderliness and rationality that disguises the subjectivity of the enterprise. In some cases in which courts have held at-large systems unconstitutional, the Zimmer criteria have played only a peripheral role in the outcomes. The Fifth Circuit Court of Appeals, in 1977, affirmed a district court holding of unconstitutional dilution in the maintenance of at-large elections for city council in Dallas, Texas. The record in Lipscomb v. Wise[61] found city policies responsive to blacks and Hispanics who comprised 25 percent and 8 to 10 percent, respectively, of the city's population. The at-large plan dated to 1907 and so was not rooted in tenuous state policy. The facts, however, satisfied the criteria of denial of access and lingering effects of past discrimination. (Only two blacks had been elected since 1907, voting was racially polarized, and a slating group controled electoral success.) In the Zimmer case, the facts did not even demonstrate beyond doubt that the challenged at-large system diluted black electoral strength. Elections for three of the nine school board seats in 1972, for example, produced two black winners. However, the majority opinion in the case did not believe such evidence "forecloses the possibility of dilution."

> Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations--namely that election of a black candidate would thwart successful challenges to electoral schemes on dilution grounds.[62]

The Court's observation underlines the looseness of the Zimmer criteria, a fact which becomes more apparent in unsuccessful dilution challenges. In Blacks United for Lasting Leadership, Inc. v. City of Shreveport,[63] decided by the

Fifth Circuit Court of Appeals on the same day as Nevett II, the court reversed a district court holding that at-large election of a five member commission resulted in unconstitutional dilution of the black vote. In a city in which blacks comprised about one-third of a population of 182,000, no black had been elected to the governing commission. The Appellate Court noted, however, that white candidates sought the support of black voters. The underrepresentation of blacks in city employment and the evidence of discrimination against black neighborhoods in street maintenance were offset by a new responsiveness by city officials to minority needs. The panel noted the failure of the district court to show how past discrimination limited present participation by blacks. The court remanded the case for further findings of fact, although a dissent argued that the necessary proof for dilution had been established.[64] In Kirksey v. City of Jackson, Mississippi,[65] a district court followed a similar line of reasoning in rejecting a challenge to the at-large election of a three-member city commission in Jackson. Blacks account for nearly 40 percent of the city's population of 154,000 and for about 35 percent of its registered voters. Under the commission plan adopted in 1912, no black won a party primary election or a general election--both subject to majority vote and anti-single shot requirements. The court noted a pattern of racial bloc voting. With respect to responsiveness, the court considered in detail an extensive array of policies, including appointments and employment in city government, planning, zoning, street resurfacing and lighting, fire protection, and parks. The court, while recognizing extensive discrimination in city policies through the late 1960s and early 1970s, emphasized a growing responsiveness by the city to minority needs. For example, the judge observed:

> Although the defendents concede that the percentage of black employees does not equate [sic] the percentage of black population . . . and do not deny that the above three employment discrimination suits have "produced results," . . . they nevertheless point out that the city did voluntarily enter into consent decrees in each of the above three cases and that these consent decrees have produced a dramatically favorable hiring increase of blacks.[66]

This interpretation of responsiveness contrasts sharply with that of the district court in Hendrix v. McKinney,[67] which found dilution in the at-large election of commissioners in Montgomery County, Alabama.

> While the percentage of blacks employed has increased, they remain assigned for the most part to low paying and unskilled positions. Defendents contend that, despite this slow progress, the Commission is in compliance with the court order. Compliance, however, does not necessarily prove responsiveness. The fact that the Commission continues to operate under court order proves the contrary.[68]

The contrasting analysis of similar sets of facts highlights what one commentator has called the "inherently subjective" nature of the responsiveness criterion.[69] Indeed, the concept of dilution, resting ultimately on the "totality of circumstances" or "aggregate of factors," seems to exist in the eyes of the beholding judges. The principal flaw of the Zimmer criteria is the implication in their very enumeration that some sort of objective appraisal according to clear standards is possible in dilution cases.[70]

Remedying Dilution

Where courts determine that at-large elections dilute minority voting strength, the remedy lies in the substitution of a ward or mixed plan for the at-large scheme. Absent special circumstances, apportionment plans created by federal courts must employ single-member districts only--a rule reiterated by the Supreme Court in the East Carroll Parish case discussed earlier.[71] Under the common circumstances of dilution cases, the racial minority alleging dilution is residentially segregated and, thus, single-member districts will ensure the election of one or more minority representatives.

In the remedy for the Dallas City Council, however, the district court approved a mixed plan of eight wards and three at-large seats submitted by the Council.[72] Accepting the continuation of three at-large seats, the district court noted that Mexican-Americans were too few in number and too dispersed residentially to benefit from the provision of wards; the Mexican-American community might be an influential swing vote in at-large contests. The Court of Appeals for the Fifth Circuit, which treated the eight-three plan as court-fashioned, rejected the district court's remedy because it violated the East Carroll Parish rule mandating single-member districts.[73] The U.S. Supreme Court, in contrast, regarded the mixed plan as a legislative enactment (even though the city council lacked statutory authority to reapportion itself) and held that the single-member rule did not apply to it.[74]

Interestingly, the Circuit Court had not considered the application of Section 5 of the Voting Rights Act to the mixed plan because judicially-created schemes do not fall under its preclearance provisions. The Supreme Court's classification of the plan as legislative raised the possibility that Section 5 applied to the plan and, on remand, the Court of Appeals ruled that the plan did require preclearance.[75] The Attorney General objected to the mixed plan as dilutive since black residents would probably control three seats under an all-ward plan instead of two under the mixed format. When the city sought a declaratory judgment for its plan, the District Court for the District of Columbia, in May 3, 1979, ruled that a trial would be needed to settle the question.[76] The protracted, and still incomplete, litigation on the remedy for Dallas' councilmanic elections illustrates the potential complexity of the dilution problem where the interests of two minorities lead to conflicting considerations in fashioning relief.

Even when a judicial finding of dilution in an at-large scheme unquestionably calls for the implementation of an all ward plan, there remains the question of whether districts should be drawn in order to maximize the opportunity for a racial minority to achieve proportional representation on the local governing body. In short, should districting be race-conscious or race neutral? As a practical matter (apart from the constitutional issue of the validity of race-conscious remedies), the Fifth Circuit Court of Appeals has not resolved the question very clearly.

In Marshall v. Edwards,[77] a 1978 case, the Fifth Circuit Court reviewed a district court's remedy in the Zimmer case. The district court had accepted a plan submitted by East Carroll Parish which presumably assured blacks proportional representation. By 1976, blacks made up 60 percent of the parish population and 48 percent of its registered voters. The plan in question created four overwhelming black districts (64 to 99 percent black), one marginally black district (51 percent black), and four white districts (55 to 78 percent white). In effect, the plan assured four safe black seats and gave blacks a chance for a fifth seat. The Fifth Circuit panel interpreted the plan as court-ordered (on the view that the Parish had only proposed it to the district court) and rejected it on the grounds that proportional representation is not a proper goal in a court-created plan. But the panel's rejection of proportionality seemed to be based less on principle than on doubts about the particular sort of proportionality evidenced in the Parish plan. The panel noted that providing for safe black seats achieved proportionality in terms of registered voters but fell short of proportionality in terms of population, the preferred measure in apportionment cases.[78] Moreover, the panel held that the growth of black population and black registration could undermine the proportionality of the plan within a few years.[79] The panel's reservations concerning the plan echo Justice Brennan's observation that

> . . . a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries.[80]

Indeed, the panel noted that any plan in order to be acceptable must survive scrutiny under the *Zimmer* criteria.

In a related case decided in 1977, the Fifth Circuit Court utilized the *Zimmer* criteria to evaluate alternative plans for redrawing districts in an existing single-member scheme. An *en banc* Court, in *Kirksey* v. *Board of Supervisors of Hinds County, Miss.*,[81] held that Zimmer did not permit race-neutral districting in localities where a racial minority had been denied access to the political process. In a county 35 percent black, the supervisors' plan accepted by the district court created five districts with black populations of 29.5, 53.4, 27.7, 32, and 54 percent. No district contained a black majority among registered voters. The plan, according to Fifth Circuit Court, failed the *Zimmer* test:

> The supervisors' reapportionment plan, though racially neutral, will perpetuate the denial of access. By fragmenting a geographically concentrated but substantial black minority in a community where bloc voting has been a way of political life the plan will cancel or minimize the voting strength of the black minority and will tend to submerge the interests of the black community. The plan denies rights protected under the Fourteenth and Fifteenth Amendments.[82]

Judge Gee, in a concurring opinion lamented the Court's apparent endorsement of benign racial gerrymandering in order to guarantee proportional minority representation,[83] though he believed that the Supreme Court's decision in *United Jewish Organizations of Williamsburg, Inc.* v. *Carey*[84] required such a ruling.[85]

The ambiguous conclusions of *Kirksey* and *Marshall* reveal a hidden danger in the judicial consideration of attacks on at-large elections. The remedy of single-member districts may not resolve the problem of dilution, but may instead shift it to another context because single-member districts, like at-large districts. may violate the dilution criteria of *Zimmer*. Providing enforceable standards to govern single-member districting in the remedy can prove to be as perplexing as setting out usable guidelines to evaluate dilution in at-large systems.

Dilution and the Supreme Court

The Mobile cases squarely confront the Supreme Court with the opportunity to address the judicial doctrine of unconstitutional dilution, as developed and applied within the Fifth Circuit. Whether the Supreme Court will embrace all or some part of the notion that at-large election of local governing bodies, under specific circumstances, deny equality of political access is an open question. Justice Rehnquist's concurring opinion in *Wise* v. *Lipscomb* at least raises the possibility that the court may not embrace this area of dilution theory in any respect. Chief Justice Burger and Justices Powell and Stewart joined in Rehnquist's view which asserted that:

> While this Court has found that the use of multimember districts in a state legislative apportionment plan may be invalid if "used invidiously to cancel out or minimize the voting strength of racial groups," White v. Regester, 412 U.S. 755, 765 (1973), we have never had occasion to consider whether an analogue of this highly amorphous theory may be applied to municipal governments. Since petitioners did not preserve this issue on appeal, we need not today consider whether relevant constitutional distinctions may be drawn in this area between a state legislature and a municipal government. I write only to point out that the possibility of such distinctions has not been foreclosed by today's decision.[86]

While the Court, taking Rehnquist's hint, could refuse to apply White to local at-large elections, the Court could also reject the dilution claims on an alternative ground urged by the appellants in the Mobile cases. Council for both the city commission and the school board sought, in oral argument before the Court, to reduce the problem of black political access to the persistence of racial bloc voting. But for bloc voting by whites against black candidates, at-large elections would not foreclose black representation. Thus, individual voters--not the legal structure of elections--bring about dilution.[87] The brief for the Mobile County School Board asserts that:

> . . . if minority candidates are able freely to put themselves forward for election even though with indifferent success because of the "unfortunate practice" of voting according to a candidate race--there is no constitutional wrong to be remedied, "[h]owever disagreeable this result may be . . ."[88] [quoting United Jewish Organizations v. Carey, 430 U.S. 144, at 166-167 (1977)]

In short, the dilution claim at issue does not involve state action which would trigger Fourteenth or Fifteenth Amendment coverage. On the other side, counsel for Bolden and Brown contended during oral argument that the state may not give effect to racial bloc voting by establishing or maintaining a scheme of at-large elections.

Closely related to the issue of whether dilution is rooted in state action is the question of whether the state or locality can be held accountable when its failure to act results in dilution. Counsel for appellants in their briefs and oral arguments emphasized that the city and county school board adopted at-large elections under race-neutral circumstances and that the uninterrupted maintenance of at-large elections cannot be construed as state action.[89] The argument rests on the appellants' central contention that dilution cases require a showing of official intent to discriminate. On this view, the Fifth Circuit Court of Appeals in Nevett II correctly required a showing of intent in dilution cases; the Circuit Court erred, however, in holding that intent could be inferred, even in state inaction, where the Zimmer criteria were satisfied.[90]

The appellees in the Mobile cases claimed that White requires no "showing of racial motivation in the creation or maintenance of the at-large system."[91] This interpretation ties White and previous reapportionment cases to the branch of equal protection law dealing with a"fundamental right," specifically the right to vote. For such cases, only the disproportionate impact or discriminatory effects of a law need be shown.[92] Washington v. Davis falls under the "racial classifications" branch of equal protection law, which requires a showing of intent. The appellees argued that Nevett II incorrectly applied the intent standard of Davis to dilution claims.[93]

Significantly, the Solictor General's Brief for the United States as Amicus Curiae endorsed the Fifth Circuit Court's application of an intent requirement to dilution claims in Nevett II.[94] Further, the brief supported the view of Nevett II and the Fifth Circuit Court's opinion in Bolden that intent could be inferred where the Zimmer criteria were satisfied.[95]

Even if the Supreme Court were to demand a compelling showing of intent in dilution claims, however, the briefs of the appellees strongly suggested that such evidence exists in both the city and county cases. The Bolden brief noted the Alabama Legislature's 1965 enactment requiring commissioners to run for specific executive positions (discussed earlier herein). The brief cited the efforts of white members of the Mobile state legislative delegation to block proposals to allow ward-based elections in the city. A 1965 legislative act allowed Mobile to adopt a mayor-council plan but only with at-large election of councilors. The legislature in 1976 turned down a proposal to permit Mobile to adopt a mayor-council plan with seven of nine councilors to be chosen from wards. The Bolden brief also pointed out that, except for a 1957 annexation statute that tripled the area of Mobile, the city's population in 1970 would have been 54 percent black (not 35 percent).[96]

The appellees' brief in the school board case recounted an ongoing effort by the board to derail the dilution litigation. From the outset of the suit, the board undertook a series of ingenious--if invidious--actions in order to stop the litigation. In 1975, the board agreed to support legislation establishing a ward electoral scheme for the board provided certain minor changes in language were made. After the Alabama legislature enacted the legislation, the board moved to have the dilution suit dropped.

When the district court dismissed the suit, the board proceeded to challenge the validity of the statute under the Alabama Constitution in state court. The state court found the law unconstitutional on the basis of the language the board itself had inserted. The invalidation of the ward plan reactivated the dilution suit. The board proposed a new single-member plan to be introduced at the 1976 legislative session and unsuccessfully urged the district court to postpone the suit until the bill was taken up. However, in trial testimony, the board's counsel expressed his certainty that the proposed bill was itself unconstitutional. The sequence of events led the federal judge to find the board appeared with "unclean" hands.[97] Interestingly, after the district court's remedy of single-member districts led to the election of two blacks in races for two seats in 1978, "the outgoing white commissioners voted to require a four-to-one majority to alter any existing board policy . . ."[98] The district court struck down the rule.

If the Supreme Court were to give great weight to the record of official intent set out by appellees in Bolden and Williams, it might at a stroke foreclose two troubling potentialities. By imposing a rigorous standard of intent on dilution claims, the Court could drastically proscribe the number of new suits against at-large systems. Moreover, the Court could treat the evidence in the Mobile cases as sufficient to satisfy its standard and, thus, avoid overturning the decisions of two lower courts.

Should the Court accept the substance of the dilution claims in the Mobile cases, the prescription of remedies still would pose constitutional questions of great import. By itself, the district court's disestablishment of commission government in the City of Mobile calls for a reexamaniation of the tolerable range of judicial intervention into the administration of state and local governments within a federal system. In conjunction with the dilution issue, however, the extraordinary remedy in Bolden confronts the Court with the predictable ramifacations of opening up local at-large elections to constitutional challenge. Attorneys for the City of Mobile emphasized in oral argument before the Supreme Court that the blending of executive and legislative power in the commission plan mandates at-large elections since executive responsibility, in particular, cannot be apportioned among wards. The city refused to submit a ward plan of any kind to the district court which found its at-large scheme infirm, but the city did signal a preference for a mayor-council plan if a ward remedy were imposed.[99] The district court's action, in ordering the institution of a mayor-council plan, is less an exercise of unwarranted discretion than a recognition that a commission plan cannot insulate a city's at-large elections against constitutional attack.

The more fundamental issue in the matter of remedies is the rationale underlying the creation of single-member districts. The City's brief in Bolden highlighted the paradoxical impact of the ward remedy.

> Finally, the existence of racially polarized voting is turned on its head in the remedy. This unfortunate feature of voting behavior is cited to declare at-large elections invalid. But without polarized voting (and residential housing segregation), a districting remedy would be a nugatory gain for blacks. The Remedial Orders of the Courts must hope for, and indeed perpetuate, racially polarized voting and racially segregated residential housing for the future.[100]

During oral argument, Justice White touched on this paradox when he asked James U. Blacksher, an attorney for Bolden and Brown, to prescribe the remedy for dilution if blacks and whites in Mobile were randomly distributed residentially. Blacksher responded that no remedy would be available, but that the fact of racial integregation in housing would, in reality be inconsistent with polarized voting.

The claim of appellees in Bolden and Brown could be reduced to the contention that racial discrimination manifested in official action and white bloc voting unconstitutionally prevents any black representation. Furthermore, the remedy must guarantee black representation not because a racial minority is entitled to proportioanal representation but because minority representation in the Mobile setting would not occur unless the system were structured to bring it about.

Were the Supreme Court to link closely the fact of official racial discrimination with the remedy of single-member districts, it could limit the dilution doctrine to manageable proportions for federal courts. Indeed, as Chief Justice Burger has argued, extending the remedy of compensatory districting to situations where evidence of discrimination in the electoral system is minimal could be an irrelevant pursuit. Dissenting in the United Jewish Organizations, the Chief Justice observed:

> For example, it would make no sense to assure nonwhites a majority of 65% in a voting district unless it were assumed that nonwhites and inde- whites vote in racial blocs, and that the blocs vote adversely to, or pendently of, one another. Not only is the record in this case devoid of any evidence that such bloc voting has taken or will take place in Kings County [New York], but such evidence as there is points in the opposite direction: We are informed that four out of the five "safe" (65%+) nonwhite districts established by the 1974 plan have since elected white representatives. Brief for Respondent-Intervenors 48.

> The assumption that "whites" and "nonwhites" in the county form homogeneous entities for voting purposes is entirely without foundation. The "whites" category consists of a veritable galaxy of national origins, ethnic backgrounds, and religious denominations. It simply cannot be assumed that the legislative interests of all "whites" are even substantially identical. In similar fashion, those described as "nonwhites" include, in addition to Negroes, a substantial portion of Puerto Ricans.[101]

The Chief Justice's account can be read to support the Court's holdings in Whitcomb and White. That is, adjudication of dilution claims can only proceed within the framework of racial discrimination. Further, such claims would require a demonstration that racial controversies dominate the political agenda and that a white majority through official action and bloc voting effectively forecloses minority participation in the electoral process. Confirmation of this approach could permit the Supreme Court to affirm the lower court decisions in Bolden and Brown without touching off a rash of suits against other at-large systems.

Footnotes

[1] Bolden v. City of Mobile, 423 F. Supp. 384 (S.D. Ala., S.D. 1976), as amended October 28, 1976.

[2] Ibid., at 402.

[3] Brown v. Moore, 428 F. Supp. 1123 (S.D. Ala., S.D. 1976).

[4] Bolden v. City of Mobile, 571 F. 2d 238 (5th Cir. 1978).

[5] Brown v. Moore, 575 F. 2d 298 (5th Cir. 1978).

[6] City of Mobile v. Bolden, No. 77-1844, Williams v. Brown, No. 78-357. Appeal of a third dilution case, in which the Fifth Circuit Court of Appeals rejected a dilution claim involving at-large election of city aldermen in Fairfield, Alabama, is pending. Nevett v. Sides, No. 78-492, reported below at 571 F. Supp. 209 (1978).

[7] All but the Pensacola case Jenkins v. City of Pensacola, __________, F. Supp. __________ (N.D. Fla., Aug. 11, 1978) are discussed in the text and n. 70 below.

[8] See Nathan Glazer, "Towards an Imperial Judiciary?" The Public Interest (Fall 1975): pp. 104-123.

[9] Portions of this section are taken from the author's "City and County At-Large Elections and the Problem of Minority Representation," 55 The University of Virginia News Letter (February 1979).

[10] For a concise comparison of at-large and ward plans, see William J. D. Boyd, "Local Electoral Systems: Is There a Best Way?" 65 National Civic Review 136-140, 157 (1976).

[11] Barbara H. Grouby and Mary A. Schellinger, "Profiles of Individual Cities," The Municipal Yearbook 1978 (Washington, D.C.: International City Management Association, 1978), p. 6.

[12] Robert P. Boynton, "City Councils: Their Role in the Legislative System," The Municipal Yearbook (Washington, D.C.: International City Management Association, 1976), pp. 68-69.

[13] For example, see Samuel P. Hays, "The Politics of Reform in Municipal Government in the Progressive Era," 55 Pacific Northwest Quarterly 157-169 (1964).

[14] Efforts to discern changes in campaign style and recruitment of candidates in cities which have switched from at-large to ward elections include Eugene C. Lee and Jonathan Rothman, "San Francisco's District System Alters Electoral Politics," 67 *National Civic Review* 173-178 (1978); Robert J. Mundt, "Referenda in Charlotte and Raleigh, and Court Action in Richmond: Comparative Studies on the Revival of District Representation" (Paper prepared for the 1979 Annual Meeting of the American Political Science Association, Washington, D.C., 30 August - 3 September, 1979). Charles L. Cotrell and Arnold Fleischman, "The Change from At-Large to District Representation and Political Participation of Minority Groups in Fort Worth and San Antonio, Texas" (Paper prepared for the 1979 Annual Meeting of the American Political Science Association, Washington, D.C., 30 August - 3 September, 1979).

[15] See Edward C. Banfield and James Q. Wilson, *City Politics* (Cambridge: Harvard University Press, 1966), pp. 307-308, for a discussion of this phenomenon in Detroit.

[16] Armand Derfner, "Multi-member Districts and Black Voters," 2 *Black Law Journal* 120, at 127 (1972).

[17] For instance, Albert K. Karnig analyzed black representation in 139 cities with a population in excess of 25,000 and a minimum 15 percent black population, computing for each city the ratio between the percentage of council seats held by blacks in 1972 and the black percentage of the city's population. The ratio for all ward cities equaled .772; for at-large cities, it was .457; and for cities using a combination of ward and at-large districts, it was .546. "Black Representation on City Councils: The Impact of District Elections and Socio-economic Factors," 12 *Urban Affairs Quarterly* 223-242 (1976). Theodore P. Robinson and Thomas R. Dye's analysis of 1976 councils in 105 central cities with 15 percent black populations produced similar findings. The ratio for ward cities equaled .85; ratios in cities with a pure at-large format averaged .42, while cities employing an at-large scheme with a district residency requirement had an average ratio of .48. The ratio for mixed cities was .78. "Reformism and Black Representation on City Councils," 59 *Social Science Quarterly* 133-141 (1978). In a related examination of 160 central cities, Delbert Taebel found that among ward cities the number of seats significantly influenced levels of black representation; larger councils produced greater representation. In 60 central cities, use of at-large or ward elections accounted for little of the variation in the representation of Hispanics. "Minority Representation on City Councils: The Impact of Structure on Blacks and Hispanics," 59 *Social Science Quarterly* 142-152 (1978). Also see Susan A. MacManus, "City Council Election Procedures and Minority Representation: Are They Related?" 59 *Social Science Quarterly* 153-161 (1978). MacManus' analysis of 243 central cities, using a more extensive typology of electoral schemes than the studies citied above, concludes that all electoral forms underrepresent minorities and that the responsiveness of public policies rather than the level of council representation is a better test of minority influence. A most recent analysis, received too late for treatment herein, is Margaret K. Latimer, "Black Political Representation in Southern Cities: Election Systems and Other Causal Variables," 15 *Urban Affairs Quarterly* 65-86 (1979).

[18] MacManus, "City Council Election Procedures," summarized in n. 17.

[19] Ibid., esp. 156-157.

[20] The Voting Rights Act of 1965, as amended, is set out in 42 U.S.C. §1973, subchapters I-A, I-B, and I-C.

[21] Information on jurisdictions covered by Section 5 is adapted from Charles L. Cotrell and R. Michael Stevens, "The 1975 Voting Rights Act and San Antonio, Texas: Toward a Federal Guarantee of a Republican Form of Government," 8 *Publius* 79-99, esp. at 82.

[22] The Court upheld the constitutionality of the act in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). In *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), the Court held that Section 5 covered virtually all changes in electoral laws. *Perkins* v. *Matthews*, 400 U.S. 379 (1971) made municipal

annexations subject to preclearance. Also see John J. Roman, "Section 5 of the Voting Rights Act: The Formation of an Extraordinary Federal Remedy," 22 *American University Law Review* 111-133 (1972); Alfreida B. Kenny Harrell, "The Voting Rights Act of 1965 and Minority Access to the Political Process," 6 *Columbia Human Rights Law Review* 129-153 (1974); William J. Wernz, "'Discriminatory Purpose,' 'Changes,' and 'Dilution': Recent Judicial Interpretations of §5 of the Voting Rights Act," 51 *Notre Dame Lawyer* 333-351 (1975); and Abigail M. Thernstrom, "The Odd Evolution of the Voting Rights Act," *The Public Interest* (Spring 1979): pp. 49-76. The administrative aspects of the Voting Rights Act receive special attention in Howard Ball, Dale Krane, and Thomas P. Lauth, Jr., "'Conquered Provinces' or Compromised Compliance: Intergovernmental Dimensions of Voting Rights Enforcement" (Paper prepared for the 1979 Annual Meeting of the American Political Science Association, Washington, D.C., 30 August - September 3, 1979).

[23] Cotrell and Stevens, "1975 Voting Rights Act," at 82, 95. Also see U.S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After* (Washington, D.C.: U.S. Commission on Civil Rights, 1975), esp. pp. 402-409, which list the Attorney General's objections to electoral changes under Section 5 through December 20, 1974.

[24] *Beer* v. *United States*, 425 U.S. 130 (1976). See the application of *Beer* to the conversion from a three member at-large plan to a four ward/three at-large format for the Fulton County, Georgia, Board of Commissioners. *Pitts* v. *Cates*, 536 F. 2d 56 (5th Cir. 1976) (*per curiam*).

[25] 425 U.S. 130, at 146-150, 156-158 (Marshall, J., dissenting).

[26] 400 U.S. 379 (1971).

[27] *City of Petersburg* v. *United States*, 410 U.S. 962 (1973), reported below, 354 F. Supp. 1021 (1973).

[28] *City of Richmond* v. *United States*, 422 U.S. 358 (1975). Among the commentaries are "Judicial Review of Municipal Annexations Under Section 5 of the Voting Rights Act," 12 *Urban Law Annual* 311-320 (1976); Brian A. Powers "Constitutional Law - Annexations and the Voting Rights Act," 54 *North Carolina Law Review* 206-216 (1976); Joseph F. Zimmerman, "The Federal Voting Rights Act: Its Impact on Annexation," 66 *National Civic Review* 278-283 (1977).

[29] See Cotrell and Stevens, "1975 Voting Rights Act."

[30] *Greater Houston Civic Council* v. *Mann*, 440 F. Supp. 696 (S.D. Tex. 1977).

[31] The annexation plan in question reduced the black percentage of the city's population from 26.0 to 24.8. The Mexican American population dropped from 14.0 to 13.5 percent. A local referendum, passed August 11, 1979, created a fourteen-member council, with nine members to be elected from wards and five at-large. The plan still requires Justice Department approval. A summary of developments is provided in 9 *Election Administration Reports* 3 (August 15, 1979).

[32] See *Dove* v. *Moore*, 539 F. 2d 1152 (8th Cir. 1976), which rejected a claim against an at-large councilmanic plan in Pine Bluff, Arkansas. (Forty percent of the city's population of 58,000 is black). The Court found, among other mitigating factors, that a black incumbent enjoyed the support of both white and black voters. The case is analyzed in Jonathan Birenbaum, "Discriminatory Effect of Elections At-Large: The 'Totality of Circumstances' Doctrine, " 41 *Albany Law Review* 363-387 (1977). Also see *Black Voters* v. *McDonough*, 565 F. 2d 1 (1st Cir. 1977), which affirmed a district court dismissal of a suit against at-large election of the school board in Boston (20 percent black); no black had been elected to the board at the time of the suit; *Kendrich* v. *Walder*, 527 F. 2d 44 (7th Cir. 1975), which reversed a district court dismissal of a dilution challenge to an at-large commission in Cairo, Illinois, and remanded it for trial; *Vollin* v. *Kimbel*, 519 F. 2d 790 (4th Cir. 1975), which affirmed a district court dismissal of a dilution claim against at-large election of the governing board of Arlington County, Virginia, where blacks comprise less than 6 percent of voters.

[33] A suit by the Justice Department in behalf of Indian residents against at-large elections for the Board of Supervisors in Thurston County, Nebraska, led to a consent decree in which the board agreed to the substitution of a single member plan. The suit involved claims under the Fourteenth and Fif-

teenth amendments and the Voting Rights Act. 9 *Election Administration Reports* 2-3 (June 6, 1979). A Justice Department suit against at-large election of county commissioners in San Juan County, New Mexico, is pending in federal district court. The suit alleges that the election scheme dilutes the voting strength of Navaho Indians. 9 *Election Administration Reports* 6-7 (July 18, 1979). At-large election procedures for the Pasendena, California, city council are under attack in a suit alleging dilution in violation of the California Constitution. 9 *Election Administration Reports* 7-8 (August 1, 1979).

[34] 485 F. 2d 1297 (5th Cir. 1973). The case is analyzed in "Constitutional Law - Equal Protection - At-Large Election of Parish Officials Unconstitutionally Dilutes Voting Strength of Black Voters Where There Persist the Effects of a State Policy That Has Historically Hindered Participation of Blacks in Electoral Process," 26 *Alabama Law Review* 163-176 (1973), hereinafter cited as "Participation of Blacks." Also see "Equal Protection of the Laws - Reapportionment - Multimember Districting of County Governing Bodies May Work Unconstitutional Dilution of Minority Voting Strength," 87 *Harvard Law Review* 1851-1860 (1974).

[35] *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971); *White* v. *Regester*, 412 U.S. 755 (1973). The development of the doctrine of unconstitutional dilution in the Fifth Circuit has proceeded, with some exceptions to be considered later, primarily within the legal framework established by *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and subsequent reapportionment cases, including *Whitcomb* and *White*.

Reynolds held that the guarantee of equal protection in the Fourteenth Amendment prohibited state legislative apportionment schemes which diluted or debased the votes of individual citizens by creating districts of substantially unequal population. *Avery* v. *Midland County*, 390 U.S. 474 (1968), extended the "one person, one vote" principle to apportionment plans of local governing bodies.

Local at-large elections, of course, satisfy the "quantitative" requirements of *Reynolds* and *Avery* but may be infirm under "qualitative" standards of equal representation that come into play after the equal-population mandate has been met. Specifically, federal courts have considered at-large elections in light of Supreme Court rulings on the use of multimember districts in state legislative apportionment schemes. The Court in *Reynolds* (at 577, 579) sanctioned the use of multimember districts and in *Fortson* v. *Dorsey*, 379 U.S. 433 (1965) and *Burns* v. *Richardson*, 384 U.S. 73 (1966) approved of the use of multimember districts in specific state legislative apportionment plans. Although *Fortson* and *Burns* recognized the potentially adverse impact of multimember districts on minority voting strength, the Court found it unnecessary to reach the constitutional questions posed by such dilution since in neither case had the invidious effects been demonstrated by the evidence presented. *Whitcomb* and *White*, discussed in the text, considered and ruled on the dilution issue with respect to state legislative multimember districts in Indiana and Texas, respectively.

Good histories of reapportionment litigation are Gerhard Casper, "Apportionment and the Right to Vote: Standards of Judicial Scrutiny," 1973 *The Supreme Court Review* 1-32 (1973); Richard L. Engstrom, "The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation," 1976 *Arizona State Law Journal* 277-319 (1976); Mark A. Gabis, "One Person, One Vote," 5 *Northern Kentucky Law Review* 241-269 (1978), Fernando V. Padilla and Bruce Gross, "Judicial Power and Reapportionment," 15 *Idaho Law Review* 263-303 (1979).

[36] 403 U.S. 124, quoted at 149.

[37] 485 F. 2d 1297, quoted at 1305.

[38] 412 U.S. 755, at 769.

[39] 424 U.S. 636 (1976).

Gomillion v. *Lightfoot*, 354 U.S. 339 (1960).

[40] *Paige* v. *Gray*, 399 F. Supp. 459 (M.D. Ga. 1975). See Paul W. Bonapfel, "Minority Challenges to At-Large Elections: The Dilution Problem," 10 *Georgia Law Review* 353, 362-365 (1976), for an analysis of *Paige* and the *Gomillion* precedent. In *Stewart* v. *Waller*, 404 F. Supp. 206 (N.D. Miss. 1975), (*per curiam*), a three-judge court, citing both Fourteenth and Fifteenth amendment precedents, struck down a 1962 Mississippi statute requiring all municipalities to employ

at-large elections: the law replaced provisions mandating cities with a population over 10,000 to use a six ward/one at-large plan for aldermanic elections and allowing municipalities under 10,000 to choose between mixed and at-large plans. The judges rejected a claim, predicated on Zimmer and a related case (Turner v. McKeithen, 490 F. 2d 191, decided in 1973), that all at-large elections in Mississippi were unconstitutional.

[41] Paige v. Gray, 538 F. 2d 1108, quoted at 1110, 1111 (5th Cir. 1976). Beer, 425 U.S. 130, at 142 n., 14, noted "There is no decision in this [Supreme] Court holding a legislative apportionment or reapportionment violative of the Fifteenth Amendment."

[42] Paige v. Gray, 437 F. Supp. 137, esp. 145-146, no. 5 (M.D. Ga. 1977).

[43] 538 F. 2d 1108, at 1111. See Bonapfel, "Minority Challenges," at 364.

[44] See notes 49-50 below.

[45] Nevett v. Sides (Nevett II), 571 F. 2d 209 (5th Cir. 1978). In an earlier version of this case, the Court of Appeals reversed a judgment for the plaintiffs because the district court failed to apply the Zimmer criteria. 533 F. 2d 1361 (1976).

[46] 426 U.S. 229 (1976).

[47] 429 U.S. 252 (1977).

[48] See "Racial Vote Dilution in Multimember Districts: The Constitutional Standard After Washington v. Davis," 76 Michigan Law Review 694-732 (1978); and 'Vote Dilution Challenges After Washington v. Davis" 30 Alabama Law Review 396-418 (1979).

[49] Judge Wisdom, specially concurring in Nevett II, at 231, argues that neither Washington nor Arlington Heights imposed an intent standard in dilution cases, since voting rights disputes are distinguishable from other equal protection cases. The argument is given more elaborate treatment in the text at pp. 27-28.

[50] Zimmer, 485 F. 2d 1297, at 1304, 1304 n. 16; pointed out in "Participation of Blacks," at 169-170.

[51] See concurring opinion of Judge Wisdom in Nevett II, at 232-233. Also Ann S. Irwin, "At-Large Voting Dilution Claims: The Fifth Circuit Requires Racially Motivated Discrimination," 9 Cumberland Law Review 443, at 451-452 (1978).

[52] Nevett II, at 223.

[53] Ibid., at 226-227.

[54] Bolden, 423 F. Supp. 384, at 388.

[55] Ibid., at 389.

[56] Brief for Appellees in City of Mobile v. Bolden, No. 77-1844, U.S. Supreme Court, p. 76 (hereinafter cited as Bolden brief). Please note that supplemental briefs have been filed by parties to this case.

[57] Bolden, 571 F. 2d 238, at 245-246.

[58] Ibid.

[59] Ibid., at 246-247.

[60] Brown, 428 F. Supp. 1123.

[61] 551 F. 2d 1043 (5th Cir. 1977), reported below, 399 F. Supp. 782 (N.D. Tex. 1975).

[62] Zimmer, 485 F. 2d 1297, at 1307.

[63] 571 F. 2d 248 (5th Cir. 1978).

[64] Ibid., at 255-257 (Wisdom, J., dissenting).

[65] 461 F. Supp. 1282 (S.D. Miss. 1978).

[66] Ibid., at 1295.

[67] 460 F. Supp. 626 (M.D. Ala., N.D. 1978). See n. 70.

[68] Ibid., at 632.

[69] Bonapfel, "Minority Challenges, " at 385. Also see John Daniel Hull, IV, "Challenges to At-Large Election Plans: Modern Local Government on Trial," 47 Cincinnati Law Review 64-77, esp. 74-77 (1978).

[70] Among the successful challenges to at-large elections, apart from those discussed in the text, are several which merit summary. In Ausberry v. City of Monroe, Louisiana, 456 F. Supp. 460 (W.D. La. 1978), Judge Dawkins struck down at-large election of a three-member commission in a city of over 56,000 people, roughly 38 percent of whom are black. At-large election of county commissioners in Montgomery County, Alabama, fell in Hendrix v. McKinney, 460 F. Supp. 626 (M.D. Ala., N.D. 1978). The county's population of nearly 168,000 is 36 percent black. The at-large plan in effect dated to 1957 when the state legislature, anticipating the potential impact of the Civil Rights Act of 1957, abandoned a districted format in place for fifty years. (In both Ausberry and Hendrix, the judges requested the appropriate authorities to submit new electoral plans.)

In at least three dilution cases, dependant public officials conceded the unconstitutionality of the contested at-large plans at some point in the litigation. Two concerned Louisiana municipalities in which blacks constituted a majority in the population and a minority of registered voters; in neither city had a black been elected to the governing council under the existing at-large format. See Wallace v. House, 515 F. 2d 619 (5th Cir. 1975), involving the town of Ferriday, and its companion case, Perry v. City of Opelousas, 515 F. 2d 639 (5th Cir. 1975). (Further action in Wallace is discussed in n.73 below.) The third suit attacked at-large election of trustees for the Waco, Texas, Independent School District, the population of which is 19.4 percent black and 8.7 percent Mexican-American. Calderon v. McGee, 584 F. 2d 66 (5th Cir. 1978).

Among the unsuccessful dilution cases and cases of uncertain status are David v. Garrison, 553 F. 2d 923 (5th Cir. 1977), reversing and remanding for further findings of fact a district court's ruling against an at-large commission in Lufkin, Texas (28 percent black); Wilson v. Vahue, 537 F. 2d 1142 (5th Cir. 1976), affirming without comment a district court's dismissal of a suit against an at-large plan in Amarillo, Texas (5.2 percent black, 6.6 percent Mexican-American) - reported below at 403 F. Supp. 59 (N.D. Tex. 1975): and Thomasville Branch of NAACP v. Thomas County, 571 F. 2d 257 (5th Cir. 1978), per curiam, reversing a district court's dismissal of a suit against the Commission of Thomas County, Georgia (35.4 percent black) and remanding for trial. The last case was decided with Nevett II.

[71] 424 U.S. 636 (1976).

[72] Lipscomb v. Wise, 399 F. Supp. 782, esp. at 792-794 (N.D. Tex. 1975).

[73] Lipscomb v. Wise, 551 F. 2d 1043 (5th Cir. 1977). The Fifth Circuit Court's acceptance of a mixed remedy in Wallace, 515 F. 2d 619, had been vacated by the Supreme Court in Wallace v. House, 425 U.S. 947 (1976). See n. 70 above.

[74] Wise v. Lipscomb, 437 U.S. 535 (1978).

[75] Lipscomb v. Wise, 583 F. 2d 212 (5th Cir. 1978).

[76] 9 Election Administration Reports 7-8 (May 23, 1979).

[77] 582 F. 2d 927 (5th Cir. 1978).

[78] Ibid., at 937.

[79] Ibid., at 934-935, n. 8.

[80] United Jewish Organization of Williamsburgh v. Carey, 430 U.S. 144, at 172 (1977) (Brennan, J., concurring).

cert. denied, 434 U.S. 968 (1977).

[81] 554 F. 2d 139 (5th Cir. 1977) (en banc), The case is criticized in "Group Representation and Race-Conscious Apportionment: The Roles of States and the Federal Courts," 91 Harvard Law Review 1847-1873 (1978); this article also provides an excellent argument against the general concept of group voting rights and race-conscious apportionment.

[82] Kirksey, 554 F. 2d 139, at 151.

[83] Ibid., at 155 (Gee, J., concurring).

[84] 430 U.S. 144 (1977).

[85] Also see Moore v. LeFlore County Board of Election Commissioners, 502 F. 2d 621 (5th Cir. 1974); and United States v. Board of Supervisors of Forrest County, Mississippi, 571 F. 2d 951 (5th Cir. 1978).

[86] 437 U.S. 535, at 550 (Rehnquist, J., concurring).

[87] Descriptions of oral arguments in Bolden and Brown before the U.S. Supreme Court on March 19, 1979 are drawn from the author's observations.

[88] Brief for Appellants in Williams v. Brown, No. 78-357, U.S. Supreme Court, pp. 59-60 (hereinafter cited as Williams brief). Please note that supplemental briefs have been filed by the parties in this case.

[89] Brief for Appellants in City of Mobile v. Bolden, No. 77-1844, U.S. Supreme Court, p. 28 (hereinafter cited as City brief); Williams brief, pp. 60-61.

[90] City brief, pp. 27-28, Williams brief, pp. 36-42.

[91] Bolden brief, esp. pp. 53-61, quoted at p. 7. Also Brief for Appellees in Williams v. Brown, No. 78-357, U.S. Supreme Court, p. 36 (hereinafter cited as Brown brief).

[92] Bolden brief, pp. 53-61. This point is given elaborate treatment in Barbara L. Berry and Thomas R. Dye, "The Discriminatory Effects of At-Large Elections," 7 Florida State University Law Review 85-122 (1979); this article argues for a per se rule against at-large elections. Also see n. 48 above and the citations therein.

[93] Ibid., pp. 53-54.

[94] Amicus brief in City of Mobile v. Bolden, No. 77-1844 and Williams v. Brown, No. 78-357, U.S. Supreme Court, pp. 51-52 (hereinafter cited as Amicus brief).

[95] Ibid., pp. 32-33.

[96] Bolden brief, pp. 21-22, 30-31.

[97] Brown brief, pp. 20-29.

[98] Ibid., p. 51.

[99] Bolden brief, pp. 92-94.

[100] City brief, pp. 30-31.

[101] 430 U.S. 144, at 184-185.

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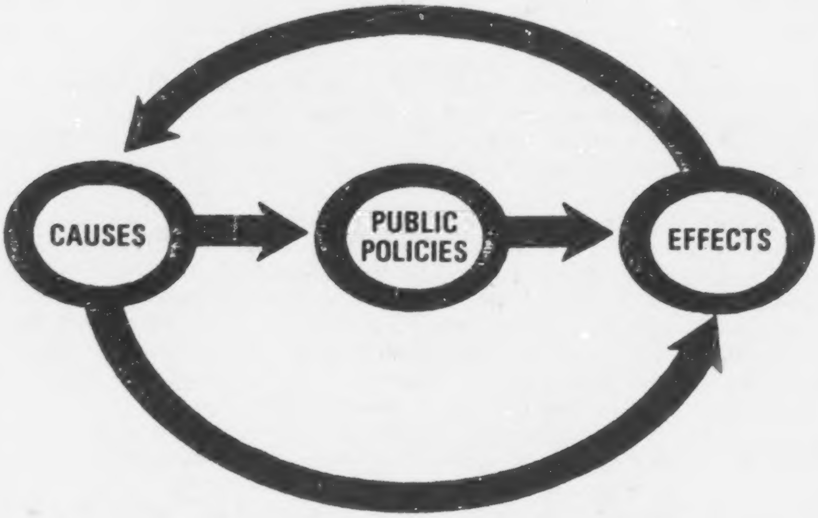
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CON AFFIRMATIVE GERRYMANDERING

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During the decade following *Baker v. Carr*,[1] the United States Supreme Court was called upon to decide many cases dealing with apportionment and districting. The bulk of these dealt with population differences among legislative districts: how much of a departure from precise equality was permissible. Some involved partisan gerrymandering and presented the question of whether that practice was constitutionally allowable. A few other aspects of legislative representation also engaged the attention of the Court. But in the early '70s a new question, not previously considered, was presented: whether or not a deliberate attempt to predetermine the composition of a legislative body through use of the districting process was sanctioned by the federal Constitution.

Although the most widely noticed--and most controversial--form in which this question came before the Supreme Court posed the issue in a racial context, the Court's initial encounter with the question did not involve race at all. Rather, it dealt with *political party* structuring: with numbers of Democrats and Republicans rather than numbers of blacks and whites. The case, *Gaffney v. Cummings*,[2] decided in June, 1973, sprang from a redistricting of the Connecticut State Legislature.

One of the grounds on which the Connecticut redistricting had been attacked was that it reflected a deliberate effort to create specific numbers of Democratic and Republican districts in rough proportion to the "normal" political party division within the state. The required gerrymandering necessitated by this effort was referred to by the attorneys who defended the Connecticut redistricting as "benevolent consideration of past election results"--that is, as a kind of "benevolent gerrymander."[3]

The plaintiffs in Connecticut charged that this deliberate political structuring violated the rights of minorities: Democratic minorities in districts which the state had preordained would be Republican and vice versa. But the Supreme Court saw it differently. It opined that such "benevolent, bipartisan gerrymandering" was not merely permissible but that it was indeed commendable. "The very essence of districting is to produce...a more 'politically fair' result than would be reached with elections at large," wrote Justice Byron White who authored the decision. "...(N)either we nor the district courts have a constitutional warrant to invalidate a state plan...because it undertakes, not to minimize or eliminate the political strength of any group or party, but to *recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls....*" (emphasis added).[4]

The apparent thrust of the *Gaffney* decision was to sanction gerrymandering as long as that practice was used to produce a result the Court deemed "politically fair." (The Court has never ruled on the question of whether gerrymandering which produces an "unfair" result is constitutionally permissible. Indeed it appears to have deliberately skirted that issue on several occasions.)

Four years later the Court confronted what was in many respects the same basic question, predetermination of representational patterns through the districting process, but this time the emotionally supercharged issue of race was involved.

At the beginning of the decade, the New York Legislature had redrawn that state's legislative and Congressional district boundaries. It was that redistricting which became the subject of litigation and led eventually to the Supreme Court's landmark 1977 decision in *United Jewish Organizations of Williamsburg v. Carey.*[5]

The case revolved around state legislative lines in two New York City boroughs, Brooklyn and Manhattan, and Congressional district lines in Brooklyn alone. Early in 1974, the U.S. Department of Justice, acting on the basis of complex provisions of the Voting Rights Acts of 1965 and 1970, had ruled that New York State had failed to prove, as required under the Voting Rights Act, that its redistricting had not had the effect of abridging the right to vote because of race or color. Specifically, it was charged that blacks and Hispanics had been unduly concentrated in several Brooklyn and Manhattan districts, and that minority strength in adjacent districts had thereby been diluted--the result being that those groups were underrepresented in the Legislature and Congressional delegation.[6] (It is ironic that this case arose from a situation involving application of Section 5 of the Voting Rights Act to counties in a northern state, for that legislation had clearly been designed by its framers to combat the classic forms of anti-black discrimination in the South: direct and indirect denial of access to participation in the political process. The law was applicable to part of New York State only because of a technicality: because the State had in the past had a literacy qualification for voting and because the voting participation level in the counties involved had fallen below the fifty percent mark in 1968.[7]

The effect of the Justice Department's 1974 ruling was to invalidate New York's redistricting laws and require substitution of new districting arrangements designed to yield a legislative and Congressional delegation that reflected the racial composition of the counties involved. Informally, the Justice Department apparently indicated that it would approve a districting pattern only if a number of additional districts were created in which the non-white majority was in the neighborhood of *65%*--a figure apparently believed to be high enough *to overcome the effects of lower minority-group voting-participation.*[8] In effect, the Legislature was told that it must not merely avoid efforts to minimize minority representation, but that it was required to take positive action to maximize the number of minority representatives.[9] Thus the concept of "affirmative action"--positive steps to atone for alleged past injustices--was applied to the districting process.[10]

Ironically, critics of New York State's redistricting practices had, over the years, alleged many past injustices--but these had been political, not racial, in character. They had usually been characterized by Republican efforts to minimize Democratic representation or, more recently, by bipartisan "arrangements" to protect the seats of incumbents of both parties.[11] After 1970 there had been a clear effort by the Republicans, then in control of the Legislature, to perpetuate their majorities, so the lines had been laid down in the first instance by the GOP to hold down the number of Democratic districts and, in areas of the state where that was not possible, selected Democrats had been given a say in the placement of the lines in order to counter some threatened GOP defections.[12] If any Democratic legislators were "protected," it was not whites who were protected from potential black or Puerto Rican challengers but rather regulars who were protected from potential threats posed by "reform" Democrats--all of whom were white. (It is noteworthy that with regard to the four Manhattan Assembly districts cited by the Justice Department, one was represented by a white "Reform Democrat" who voted *against* the 1971 redistricting whereas the other three were represented by blacks, all of whom *supported* the measure! Indeed, nine of the fifteen members of the Legislature's Black and Puerto Rican Caucus had voted for the redistricting bill in the face of the strong opposition of their own party leadership!) (*New York Times*, April 7, 1974).

In 1974, in line with the Justice Department's action, the Legislature redrew the congressional lines in Brooklyn and the legislative lines in both boroughs. The new plan did not change the number of districts with non-white majorities but did alter the size of those majorities in order to create a number of additional districts in which the non-white majorities were close to 65 percent.

This new element in redistricting evoked a variety of reactions. Even the minority groups themselves were not united in support of the new arrangement or even of the Justice Department's reasoning. Manhattan Borough President Percy Sutton complained that the new lines, rather than adding to the number of minority legislators, would probably jeopardize the seats of several already in office (*New York Times*, May 29, 1974). (This echoed a controvery within the black community a decade earlier when the late Congressman Adam Clayton Powell opposed a move by black plaintiffs who had charged discrimination because Powell's district had been given an 86% black majority. This indicated an effort, they had alleged, to concentrate blacks in one district in order to keep the adjacent districts as white as possible. But Powell argued that any change would make his district vulnerable to a non-black challenger and was thus inimical to black interests.)[13]

Puerto Rican leaders in Brooklyn also complained that even if the new 1974 redistricting did succeed in increasing the number of black legislators, nothing in the revised districting law would do the same for them (*New York Times*, June 23, 1974). By contrast, black leaders in Manhattan protested that a new district in East Harlem ostensibly drawn to assure the election of a Puerto Rican, would place two obviously secure black districts in jeopardy. And a noted black academician challenged the whole concept underlying the redistricting. "At some point," he wrote, "black and Puerto Rican politicians must assume the responsibility of their own political mobilization. The courts should not be asked to require district lines predicated on turnout. If the minority voters are not prone to turn out, this is not...a legal problem but a political one. The situation calls for the skills of precinct captains, not plaintiffs" (Hamilton, 1974).

One group especially aggrieved by the 1974 redistricting was the Hasidic Jewish community in the Williamsburg section of Brooklyn. Prior to the realignment, virtually the entire community had been located within a single Assembly and state Senate district. In the attempt to create additional districts with the requisite-sized black and Puerto Rican majorities, however, the legislature had drawn the new district lines in a way which split the Hasidi~~s~~m among two Assembly and two Senate districts. This, their leaders felt, eroded their political influence. The new lines, they contended, had been drawn to give special favor to two specific minority groups but in the process they--another minority group--had suffered serious political injury. They consequently brought suit to have the new lines overturned. The central complaint was that there was no justification for the state to have given special consideration to *any* specific ethnic group.

While this case was making its way through the Courts, the Justice Department gave its approval to the new lines and they were used in the election of 1974 (and subsequently). Ironically, only one of the five new "safe" (65%+) non-white state legislative districts in Brooklyn actually elected a non-white representative. And the 14th Congressional district, also redrawn to "assure" the election of a non-white, instead sent its white incumbent back to Congress again!

On March 1, 1977, the Supreme Court, by a seven to one majority, held that the complaint brought by the Hasidim was without merit and that the state did indeed have the legal right (and in this case the obligation imposed on it by the Voting Rights Act) to draw district lines with the specific purpose of maximizing black and Puerto Rican legislative representation.

The majority opinion was authored, like the one in *Gaffney*, by Justice White--who recognized and even drew on the parallels between the two cases. "...(N)either the Fourteenth nor the Fifteenth Amendment, "he wrote, "mandates any *per se* rule against using racial factors in districting and apportionment... Moreover, in the process of drawing black majority districts in order to comply with Section 5, the State must decide how substantial those majorities must be in order to satisfy the Voting Rights Act.... Because...the inquiry under Section 5 focuses ultimately on 'the position of racial minorities with respect to their effective exercise of the electoral franchise...the percentage of eligible voters by district is of great importance to that inquiry.' We think it was reasonable for the Attorney General to conclude in this case that a substantial nonwhite population majority--in the vicinity of 65%--would be required to achieve a non-white majority of eligible voters."[14]

Justice William Brennan, in concurring, spoke of "benign discrimination" which "may be permissible because it is cast in a remedial context with respect to a disadvantaged class rather than in a setting that aims to demean or insult any racial group."[15]

To many observers, the gist of this decision appeared to move in precisely the opposite direction from an earlier Court decision which had also been widely viewed as a judicial "landmark." In *Gomillion v. Lightfoot* (1960), the Court held that "when a legislature...singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment."[16] (That case arose when Alabama deliberately altered the boundaries of Tuskagee in order to lessen black voting power.) Now, by contrast, the Court appeared to be saying instead that under certain circumstances it was not merely permissible but desirable for a state to single out a specific minority for special advantages in the delineation of political boundary lines.

The only dissent in the 1977 decision was registered by Chief Justice Warren Burger, who noted the contrast with the 1960 ruling: "I begin with this Court's holding in *Gomillion v. Lightfoot*, ...the first case to strike down a state attempt at racial gerrymandering," wrote Burger. "If *Gomillion* teaches anything, I had thought it was that drawing of political boundary lines with the sole, explicit objective of reaching a predetermînted racial result cannot ordinarily be squared with the Constitution... The words 'racial quota' are emotionally loaded and must be used with caution. Yet this undisputed testimony shows that the 65% figure was viewed by the legislative reapportionment committee as so firm a criterion that even a fractional deviation was deemed impermissible. I cannot see how this can be characterized otherwise than a strict quota approach, and I must therefore view today's holding as casting doubt on the clear-cut principles established in *Gomillion*.... While petitioners certainly have no constitutional right to remain unified within a single political district, they do have, in my view, the constitutional right not to be carved up so as to created a voting bloc composed of some other ethnic or racial group.... If districts have been drawn in a racially biased manner in the past (which the record does not show to have been the case here), the proper remedy is to reapportion along neutral lines. Manipulating the racial composition of electoral districts to assure one minority or another its 'deserved' representation will not promote the goal of a racially neutral legislature. On the contrary, such racial gerrymandering puts the imprimatur of the State on the concept that race is a proper consideration in the electoral process. The device employed by the State of New York and endorsed by the Court today, moves us one step further away from a truly homogeneous society...."[17]

This decision in effect endorses a radical departure from the traditional American concept of legislative representation. Formerly, legislators have been considered the representatives of individual citizens who happened to reside together within a single geographic area, but here the Court appears to view lawmakers as representing not individuals but specific groups *as groups*--in this instance, as ethnic groups. Indeed, Justice White was quite explicit on this point: "...the white voter who is in a district more likely to return a nonwhite representative will be represented, to the extent that voting continues to follow racial lines, by legislators elected from majority white districts. The effect of the reapportionment on whites in districts where nonwhite majorities have been increased is thus mitigated by the preservation of white majority districts in the rest of the county."[18] In the same vein, Justice Brennan wrote that "...to the extent that white and nonwhite interests and sentiments are polarized, ...petitioners still are indirectly 'protected' by the remaining white assembly and senate districts...."[19,20]

Both Justices White and Brennan were careful to qualify their view by basing it on the assumption that racial polarization exists, but Justice Burger challenged the validity of that premise: "The assumption that 'whites' and 'nonwhites'...form homogeneous entities for voting purposes is entirely without foundation. The 'whites' category consists of a veritable galaxy of national origins, ethnic backgrounds and religious denominations. It simply cannot be assumed that the legislative interests of all 'whites' are even substantially identical. In similar fashion, those described as 'nonwhites' include, in addition to Negroes, a substantial portion of Puerto Ricans.... The Puerto Rican population, for whose protection the Voting Rights Act was 'triggered' in Kings County...[21] has expressly disavowed any identity of interest with the Negroes, and, in fact, objected to the 1974 redistricting scheme because it did not establish a Puerto Rican controlled district.... The notion that Americans vote in firm blocs has been repudiated in the election of minority members as mayors and legislators in numerous American cities and districts overwhelmingly white."[22]

Burger's dissent was reminiscent of one written thirteen years earlier by Justice William O. Douglas--who belonged to a very different ideological segment of the court. In *Wright v. Rockefeller*, the case referred to above which involved the district of Congressman Powell, Douglas wrote: "The principle of equality is at war with the notion that District A must be represented by a Negro (and) that District B must be represented by a Caucasian... That...is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense.... Government has no business designing electoral districts along racial or religious lines."[23]

An inevitable consequence of acceptance of the concept of "representation by group" which is inherent in the majority opinions in both *Gaffney* and *United Jewish Organizations* is that, at least in general elections, the individual voter is reduced to the status of a pawn or chip in a game played by the political parties or ethnic groups. (This is less true in primary contests. At that level, the individual voter's choice still plays a role; but in the general election, the deck has been stacked. The outcome has been pre-arranged. The individual voter may as well stay home. His vote is meaningless!) And whether or not, in individual situations, specific groups or parties are benefited, the system as a whole is bound to victimize whole categories of voters: Republicans who live in districts allocated to the Democrats, Democrats in districts preordained to be represented by a Republican, non-whites in districts carved out for whites, etc. Without deliberate structuring a candidate belonging to a minority party or ethnic group within a district might have a fighting chance of winning; but under the procedures condoned in these two cases, victory has been placed effectively beyond such a candidate's reach--not because of the irregular distribution of party strength or the random pattern of ethnic concentration, but because of a deliberate state policy.

The judicial blessing given to the practice of purposefully carving out districts for specific groups is troublesome in yet another respect. The minority groups involved in the New York situation at which the Court was looking in 1977 happened to live in relatively compact geographic areas. It was therefore possible to apply the quotas sanctioned by the Court. But how could this approach be used in situations in which a minority group is *not* conveniently gathered together in easily discernible chunks of territory? It would be virtually impossible, using even the most egregious kind of gerrymandering, to establish districts for groups which might even form a larger proportion of an area's population than those at issue in this case, but which were geographically dispersed.[24]

> The Chief Justice's dissent touched on this point:
>
> *"The result reached by the Court today in the name of the Voting Rights Act is ironic. The use of a mathematical formula tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshalling particular racial, ethnic or religious groups in enclaves. It suggests to the voter that only a candidate of the same race, religion or ethnic origins can properly represent that voter's interests, and that such candidate can be elected only from a district with a sufficient minority concentration."*[25]

Actually, the question of the how the practice of deliberately carving out specific districts for specific groups would work in a situation in which the groups in question were geographically scattered need not be limited to hypothetical situations, for the events in Connecticut which gave rise to the *Gaffney* case posed just such a circumstance--although there, unlike the New York situation of the later case, the groups in question were political rather than ethnic. Because of the pattern of party strength in Connecticut, it is necessary, in order to create numbers of Democratic and Republican districts in proportion to the normal statewide vote totals of the two major parties, to ferret out scattered pockets of Republican strength outside Fairfield County and string enough of them together to form legislative districts. Unless this is done, there is no way of "compensating" for the top-heavy majorities the GOP usually wins in Fairfield. But doing so requires the construction of many districts with grossly contorted, geographically illogical shapes.

The plaintiffs who had attacked the Connecticut redistricting pointed to the outlines of many such districts and alleged that this classic, teil-tale sign of gerrymandering--outlandishly-shaped districts--clearly indicated that gerrymandering was the inevitable result of the state's efforts to predetermine the political composition of the Legislature.[26] But Justice White's response clearly indicated that the Court viewed gerrymandering as an acceptable tool for achieving results it deemed desirable: "Compactness or attractiveness have never been held to constitute an independent federal constitutional requirement," he wrote.[27] In effect, the 1973 and 1977 decisions do not merely sanction gerrymandering; they mandate it, for without it, the "desirable results" are virtually impossible to achieve. Indeed, the attorneys who defended Connecticut's action in the earlier case contended quite openly that "(N)oncompactness could be the only way to provide even minimal representation of a scattered minority, racial or political."[28]

The practice endorsed by the Court in both cases is in effect an attempt to superimpose one system of representation upon the structure of another. It would be more consistent with the approach which the Supreme Court appears to have espoused if the idea of representation by districts were scrapped altogether or if the concept of a district as a single contiguous unit of territory were eliminated. Instead of having legislators represent specific geographic areas, perhaps they should represent ethnic groups or political parties *per se*, with no specified geographic base. Or, as an alternative, they might represent groups in *non-contiguous* districts. In New York, for example, the Puerto Rican areas of the South Bronx, the lower East Side of Manhattan and parts of East Harlem and northern Brooklyn might be designated a single Congressional "district"! In this way, it would be quite easy to impose a quota and provide each ethnic minority or political party with its "fair share" of seats. Indeed, in an action apparently motivated by a desire to maintain Hispanic majorities in two out of four court districts in El Paso County, Texas (an action subsequently sustained by the Justice Department in the exercise of its reviewing power under the Voting Rights Act), a non-contiguous district, consisting of two segments separated from one another by ten miles and an uninhabitable mountain range, was recently pieced together (Neighbor, 1980).

But the Supreme Court has not directly proposed such overt abandonment of the traditional concept of a district as a single piece of land; instead it has acquiesced in the superimposition of political and ethnic quotas on a geographically-based system of representation. The result of this attempt to divide apples by oranges is a hybrid system in which *neither* approach--representation by groups *or* representation by geographic areas--can work properly. The only possible way to affect a mixture of two such basically incompatible approaches is by the most blatant kind of gerrymandering--and even then, the mixture is only minimally effective.[29]

This approach to legislative representation--one which permits the state, acting in the pursuit of a "desirable" end, to decide how many whites and non-whites or Democrats and Republicans shall sit in a legislature or in Congress--has been characterized by its defenders as "benign" or "benevolent" gerrymandering. The characterization is revealing, for like benevolent *despotism*, benevolent gerrymandering is a distinctly elitist concept. Just as benevolent despotism takes power away from the people who are presumably too ignorant or unskilled to manage their own affairs, and turns it over to a just and wise dictator; so does benevolent gerrymandering take from the voters their power to determine the composition of the lawmaking body and turn it over instead to those presumed to be wise and fair enough to know what that composition *ought to be!*

"Benign" or "benevolent" gerrymandering, like all forms of gerrymandering, has yet another consequence of which its advocates take insufficient note. Gerrymandering tends to maximize the number of politically and racially *homogeneous* districts and to minimize the number of politically unstable "swing" (contestable) districts and racially mixed districts. Because homogeneous districts are usually *"safe"* districts (more or less certain to be won by one party or represented by one ethnic group), gerrymandering invariably inflates the number of safe districts. Barring a successful primary challenge, the individual incumbent is virtually assured of continued reelection for as long as he or she cares to hold the seat. This has the effect of insulating the legislative body against the consequences of changing sentiments and circumstances, for gerrymandering has provided the individual legislator, the legislative leadership and the legislature as a whole with rather strong guarantees of continued office and power. The political and ethnic composition of the legislature has been effectively frozen for a decade, and changes are possible only within a limited, narrow range. The representation system, because it has been made less politically sensitive and therefore less responsive, has thus been rendered less able to perform its most fundamental task: the translation of public sentiment into public policy as accurately as possible.

In rendering its decisions in both *Gaffney* and *United Jewish Organizations*, the Court was essentially addressing the question of how to prevent a dominant party or racial group from carving out districts in such a way as to disadvantage other parties or groups. If one rejects the solutions approved by the Court, one is still left with the problem itself: how *can* that practice be effectively curbed?

Perhaps the best way to make sure that whoever draws the district lines cannot do so in a manner calculated to bestow special advantages on any ethnic group or political party or partisan faction or favored candidates or geographic area, is to establish firm, explicit, enforceable, politically and ethnically neutral districting *guidelines* or *groundrules*. Such rules would eliminate the discretion held by those who draw the lines, and it is precisely that discretion--that power to decide where district boundaries shall be placed--which is the very essence of gerrymandering.

The way to eliminate one evil is not to substitute a counter-evil. The way to preclude the imposition of special disadvantages on any group is not by providing that group with compensating advantages beforehand (often to the consequent disadvantage of others who may be innocent bystanders). Rather, it is to make certain that no special, unwarranted advantages or disadvantages can be imposed by or against any group.

Politically and ethnically neutral criteria (such as equality of population, geographic compactness to the greatest degree achievable, geographic contiguity and avoidance of needless fracturing of existing political units) would make it impossible for *whoever* draws the lines to deliberately maximize or minimize the power of any group.

The districting provisions of the state constitution of Colorado, for example, read in part as follows: "In no event shall there be more than five percent deviation between the most populous and the least populous district in each house.... Each district shall be as compact in area as possible, and the aggregate linear distance of all district boundaries shall be as short as possible.... Each district shall consist of contiguous...precincts. ...Except when necessary to meet the equal-population requirements...no part of one county shall be added to all or part of another county in forming districts.... The number of cities and towns whose territory is contained in more than one district shall be as small as possible" (Constitution of the State of Colorado, Article V, Sections 46-47).

Such provisions, properly enforced, eliminate the possibility of any type of gerrymandering by precluding any deliberately built-in advantages or disadvantages for anyone. They do not, of course, guarantee that each political or ethnic group will end up with a proportionate share of the seats; but they do guarantee that no group can be purposefully victimized by another. By so doing, they allow the political process to work as it ought to work: with neutral rules to make sure that "the great game of politics" is played fairly.

NOTES

1. Baker v. Carr (1962) 369 U.S. 186.
2. Gaffney v. Cummings (1973) 412 U.S. 735.

3. Appellant's Motion for Expanded Consideration and urisdictional Statement and Brief, Gaffney v. Cummings, 42.

4. Gaffney v. Cummings (1973) 412 U.S. at 753-754.

5. United Jewish Organizations of Williamsburg v. Carey 1977) 430 U.S. 144.

6. See letter of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice to George D. Zuckerman, Assistant Attorney General, State of New York, Apr. 1, 1974; and *The New York Times*, Apr. 2, 1974.

7. For a thoughtful analysis of the way the Voting Rights Act has come to be applied in states outside the South, see Thernstrom (1979: 49-76).

8. Such "informal suggestion" is apparently the standard way in which the Civil Rights Division of the Department of Justice transmits its recommendations for "improvements" in electoral arrangements to local officials. Ibid., 74.

9. Referring to this, Thernstrom (1979: 60) writes: "in other words, the Attorney General made the bizarre assumption that if an ethnic group has a history of low voter turnout, it is necessary to draw district lines in such a way as to increase the concentration of that group!"

10. Noting the analogy to the question of numerical quotas in the area of school admissions, Thernstrom (1979: 60) writes: "Whether we want a society in which citizens are assigned slots on the basis of their race or ethnicity is, of course, precisely the question that the *Bakke* case has since raised with reference to higher education."

11. See Tyler and Wells (1961: 221-248); and Wells (1978: 9-13).

12. See Wells (1979: 8-14). For the role of Democrats in passage of the Republican-sponsored 1971 state legislative redistricting bill, see 9-10.

13. Wright v. Rockefeller (1964) 376 U.S. 52.

14. United Jewish Organizations of Williamsburg v. Carey (1977) 430 U.S. at 161-162, 164.

15. United Jewish Organizations of Williamsburg v. Carey (1977) 430 U.S. at 170.

16. Gomillion v. Lightfoot (1960) 364 U.S. 339 at 346.

17. United Jewish Organizations of Williamsburg v. Carey (1977) 430 U.S. at 181-187.

18. United Jewish Organizations of Williamsburg v. Carey (1977) 430 U.S. at 166 fn.

19. United Jewish Organizations of Williamsburg v. Carey (1977) 430 U.S. at 178.

20. "Yet incorporating this depressing political assumption (of racial polarization) into the Voting Rights Act is costly, for it

produces a society in which political interests are defined by racial and ethnic identity and representation is guaranteed in proportion to groups' numerical strength." Thernstrom (1979: 60).

21. The initial grounds on which Section 5 of the Voting Rights Act was ruled to be applicable to parts of New York State related to the fact that the state had conducted elections using ballots printed only in English. In the light of New York's heavy Puerto Rican population, this was interpreted by the Civil Rights Division of the Department of Justice as being, in effect, a literacy test--thus bringing Section 5 into play.

22. United Jewish Organizations of Williamsburg v. Carey (1977) 430 U.S. at 185, 187.

23. Wright v. Rockefeller (1964) 376 U.S. at 66.

24. This writer was recently made aware of an actual situation involving precisely this problem in the State of Alaska. There, the "native Alaskan" population makes up a significant proportion of the total population but is scattered in small villages in many areas of the state. The construction of districts designed to provide this minority with proportionate representation in the legislature is therefore virtually impossible. A similar situation may exist in parts of the southwest with regard to small, scattered urban and rural Hispanic enclaves.

25. United Jewish Organizations of Williamsburg v. Carey (1977) 430 U.S. at 186.

26. Brief for Appellees, Gaffney v. Cummings, 41.

27. Gaffney v. Cummings (1973) 412 U.S. at 752 fn.

28. Brief for Appellant, Gaffney v. Cummings, 72.

29. As Thernstrom (1979: 63) notes (and as the eventual electoral outcome in New York points up), "Even the most careful drawing of ward lines does not guarantee the representation of minorities in proportion to their size. Proportional racial and ethnic representation is a dubious end, and single-member districting an inadequate means."

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'Affirmative Gerrymandering' Compounds Districting Problems

by David I. Wells*

IN 1960 in *Gomillion* v. *Lightfoot*—widely hailed as a landmark decision—the United States Supreme Court ruled that "when a legislature . . . singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." That case arose when the Alabama legislature deliberately altered the boundary lines of Tuskegee in order to lessen the power of black voters in that city.

In 1977 the Supreme Court turned 180 degrees away from the gist of that ruling and held instead that under certain circumstances it was not merely permissible but indeed desirable for a state to single out a specific minority for special treatment—for special advantages—in the delineation of political boundary lines.

The origins of this significant case, decided last March 1, go back to the voting rights act of 1965 as amended by Congress in 1970. That act, in a section clearly designed to protect black voting rights in southern states, provides that states or subdivisions of states (counties, cities) which are subject to the provisions may not enforce any change in procedures related to voting without the approval of either the U. S. attorney general or a three-judge federal district court in the District of Columbia. A state or subdivision is subject to the act if two situations obtain: if less than 50 percent of all persons of voting age were registered to vote as of November 1, 1968, or if the number of persons voting in the 1968 presidential election was less than 50 percent of the voting-age population: and if the attorney general finds that the state or subdivision has maintained a literacy test or an educational or "moral" qualification for voting. Since the courts have ruled, quite properly, that political redistricting is indeed a change in procedures related to voting, redistricting laws in states and subdivisions covered by the law are not valid unless they receive federal approval in the prescribed manner.

This section of the act was applied in a number of southern states in the redistrictings which followed the 1970 census, and its application led to the overturning of districting laws quite clearly aimed at limiting the growing political strength of blacks in several states.

In 1971, however, it was found that the law, clearly intended by its framers and supporters to combat the classic forms of anti-black discrimination in the south, nevertheless was technically applicable to three northern counties: Bronx, Kings and New York counties, all of them in New York City.

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Fewer than 50 percent of all persons of voting age had voted in these counties in 1968, and the state did have a literacy qualification for voting. The state maintained, however, that no literacy test used during the previous decade had either the purpose or effect of abridging the right to vote because of race or color, and pointed out that the literacy requirement was no longer in effect. Therefore, it sought to have the three counties exempted from the provisions so that the legislative and congressional redistricting actions then pending would not have to be submitted to the attorney general or to the D. C. court. The state's motion was granted and the state legislative redistricting (passed in December 1971) and the congressional redistricting (passed in March 1972) went into effect and were used for the election of 1972 without having obtained any form of federal approval.

In October 1973, Assistant U. S. Attorney General J. Stanley Pottinger and the NAACP Legal Defense and Education Fund moved to reopen the matter. Pottinger noted that New York State had conducted an election using ballots printed only in English. This, he argued, meant that New York still did, in effect, have a literacy test for voting and that, therefore, it was subject to the voting rights act. In January 1974, the D. C. district court accepted these contentions and ordered that the New York redistricting statutes be submitted to the Justice Department for scrutiny. The state submitted briefs defending the way in which the boundaries had been redrawn, and the NAACP fund submitted counter-arguments and called on the department to disapprove the laws.

On April 1, 1974, Pottinger, on behalf of the Justice Department, ruled that, with regard to Kings (Brooklyn) and New York (Manhattan) counties, the state had not proven that the redistricting laws did not have the purpose or effect of abridging the right to vote because of race or color. (The Justice Department reportedly did not pursue the charges against the Bronx district lines because that county's regular Democratic organization had agreed to run two additional minority candidates for legislative seats in the upcoming election.) Several districts were specifically cited by Pottinger. He said that blacks had been unduly concentrated in Shirley Chisholm's 12th congressional district in Brooklyn, and also noted "excessive" minority concentrations in several Brooklyn and Manhattan state legislative districts, and consequent dilution of minority strength in adjacent districts.

The Pottinger ruling introduced a new element to the already highly controversial issue of redistricting. In the past, courts had acted negatively, to invalidate districting arrangements which deliberately minimized the number of minority group representatives. Now, a legislature was being told to take positive action to maximize the number of minority lawmakers, thus applying the concept of "affirmative action"—positive steps to atone for alleged past injustices—to the districting process.

In fact, when the legislative lines in question were originally laid out, they were not motivated by a desire to minimize minority representation. Rather, they were drawn in the first instance by Republicans to minimize Democratic representation where that was possible, and in areas where the Republicans could gain no advantages, selected Democrats were given a say in the placement of the lines in order to assure some Democratic votes for the plan in the legislature in the face of some threatened GOP defections. If any Democratic legislators were "protected," it was not whites who were protected from potential black or Puerto Rican challengers but rather regulars who were protected from potential threats posed by "reform" Democrats, all of whom were white.

The legislature proceeded to redraw the congressional lines in Brooklyn and the state legislative lines in both boroughs. The new plan did not change the number of districts with non-white majorities, but did alter the size of those majorities. The stated goal was to create a number of additional districts in which the non-white majorities were in the neighborhood of 65 percent—a figure which the Justice Department had apparently informally indicated would be required to overcome the effects of smaller minority participation levels.

The new district lines pleased some but strongly displeased others, including a significant number of non-whites. Manhattan Borough President Percy Sutton complained that the new lines, rather than adding to the number of minority legislators, would probably jeopardize the seats of several already in office. And City Councilman Samuel D. Wright, one of the prime movers in the efforts to have the lines redrawn in the first place, indicated that he did not believe the new district lines had placed enough blacks and Puerto Ricans in the new congressional district.

Puerto Rican leaders in Brooklyn also complained that even if the new arrangements did succeed in increasing the number of black legislators, nothing in the revised districting law would do the same for them. And, by contrast, black leaders in Manhattan protested that a new district in East Harlem ostensibly drawn to assure the election of a Puerto Rican, would place two previously secure black districts in jeopardy. And a noted black academician, Charles Hamilton, challenged the whole concept underlying the redistricting. "At some point," he wrote, "black and Puerto Rican politicians must assume the responsibility for their own political mobilization. . . . The situation calls for the skills of precinct captains, not plaintiffs."

One of the groups especially aggrieved by the 1974 redistricting was the Hasidic Jewish community in the Williamsburg section of Brooklyn. Prior to the boundary realignment, virtually the entire community had been located within the lines of a single Assembly district and a single state Senate district. However, in the attempt to create additional districts with the requisite-sized black and Puerto Rican majorities, the legislature had drawn the new district lines in such a way as to split the Hasidim among two Assembly and two Senate districts. This, their leaders felt, seriously eroded their political influence. The Hasidic leaders reasoned that the new lines had been drawn to give special favor to two specific minority groups, blacks and Puerto Ricans, but that as a result they—another minority group—had suffered serious political injury. They consequently brought suit to have the new district lines in Brooklyn overturned. The central complaint was not so much that the Hasidim had not been given special consideration, but that there was no justification for the state to have given special consideration to any specific ethnic group in the delineation of legislative districts.

Despite the objections, the Justice Department gave its approval to the new lines in July and they were used in the election of 1974 (and again in 1976). It is interesting to note that of the five new "safe" (65%+) non-white districts in Brooklyn, only one actually elected a non-white representative. Nevertheless, the principle underlying the 1974 redistricting remained highly controversial, and the issues raised by the legal challenge instituted by the Hasidim remained to be decided.

In January 1975, in a two-to-one ruling, a three-judge federal appeals court rejected the complaint of the Hasidim. The ruling was appealed to the U. S. Supreme Court which, in March 1977 held, by a seven-to-one majority, that the complaint was without merit; in other words, that the state did indeed have the legal right, and, in this case, the obligation imposed on it by the federal voting rights act, to draw district lines with the specific purpose of maximizing black and Puerto Rican legislative representation.

The majority opinion, written by Justice Byron White, said that:

> . . . neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment. . . . Moreover, in the process of drawing black majority districts in order to comply with Section 5 (of the Voting Rights Act), the State must decide how substantial those majorities must be in order to satisfy the Voting Rights Act. . . . Because the inquiry under Section 5 focuses ultimately on "the position of racial minorities with respect to their effective exercise of the electoral franchise . . . the percentage of eligible voters by district is of great importance to that inquiry." . . . We think it was reasonable for the Attorney General to conclude in this case that a *substantial* nonwhite population majority—in the vicinity of 65%—would be required to achieve a non-white majority of eligible voters.

Justice William Brennan, in a concurring opinion, spoke of the concept of "benign discrimination" which "may be permissible because it is cast in a remedial context with respect to a disadvantaged class rather than in a setting that aims to demean or insult any racial group."

The only dissent was registered by Chief Justice Warren Burger:

> I begin with this Court's holding in *Gomillion* v. *Lightfoot*, . . . the first case to strike down a state attempt at racial gerrymandering. If *Gomillion* teaches anything, I had thought it was that drawing of political boundary lines with the sole, explicit objective of reaching a predetermined racial result cannot ordinarily be squared with the Constitution. . . . The words "racial quota" are emotionally loaded and must be used with caution. Yet this undisputed testimony shows that the 65% figure was viewed by the legislative reapportionment committee as so firm a criterion that even a fractional deviation was deemed impermissible. I cannot see how this can be characterized otherwise than a strict quota approach, and I must therefore view today's holding as casting doubt on the clear-cut principles established in *Gomillion*. . . . While petitioners certainly have no constitutional right to remain unified within a single political district, they do have, in my view, the constitutional right not to be carved up so as to create a voting bloc composed of some other ethnic or racial group. . . . If districts have been drawn in a racially biased manner in the past (which the

> record does not show to have been the case here), the proper remedy is to reapportion along neutral lines. Manipulating the racial composition of electoral districts to assure one minority or another its "deserved" representation will not promote the goal of a racially neutral legislature. On the contrary, such racial gerrymandering puts the imprimatur of the State on the concept that race is a proper consideration in the electoral process. . . . The device employed by the State of New York, and endorsed by the Court today, moves us one step farther away from a truly homogeneous society. . . .

This decision (officially entitled *United Jewish Organizations of Williamsburg* v. *Carey*), in effect legitimizes a radical departure from the traditional American concept of legislative representation. In the past, legislators were viewed as the representatives of individuals who happened to reside together within a single geographic area. By the logic of this decision, however, lawmakers are seen not as representing individuals but rather as representing specific groups as groups: in this instance, ethnic groups. Justice White was quite explicit on this point: ". . . the white voter who . . . is in a district more likely to return a nonwhite representative will be represented, to the extent that voting continues to follow racial lines, by legislators elected from majority white districts. The effect of the reapportionment on whites in districts where nonwhite majorities have been increased is thus mitigated by the preservation of white majority districts in the rest of the county." And in the same vein, Justice Brennan wrote that ". . . to the extent that white and nonwhite interests and sentiments are polarized, . . . petitioners still are indirectly 'protected' by the remaining white Assembly and Senate districts. . . ."

Both opinions are, of course, based on and qualified by the questionable premise that such a polarization does in fact exist, a premise forcefully refuted by Justice Burger:

> The assumption that "whites" and "nonwhites" . . . form homogeneous entities for voting purposes is entirely without foundation. The "whites" category consists of a veritable galaxy of national origins, ethnic backgrounds and religious denominations. It simply cannot be assumed that the legislative interests of all "whites" are even substantially identical. In similar fashion, those described as "non-whites" include, in addition to Negroes, a substantial portion of Puerto Ricans. . . . The Puerto Rican population, for whose protection the Voting Rights Act was "triggered" in Kings County . . . has expressly disavowed any identity of interest with the Negroes, and, in fact, objected to the 1974 redistricting scheme because it did not establish a Puerto Rican controlled district. . . . The notion that Americans vote in firm blocs has been repudiated in the election of minority members as mayors and legislators in numerous American cities and districts overwhelmingly white.

While the notion of "representation by group" as well as the concept that the state should make positive efforts to guarantee that such groups be assured a "fair" or proportional share of the seats in a legislative body, was stated quite explicitly in this decision, it was actually foreshadowed in a 1973 Supreme Court ruling in *Gaffney* v. *Cummings*, which involved a redistricting of the Connecticut legislature. In that instance, however, the issue was not ethnic but political—not whites and non-whites but Democrats and Republicans. Interestingly, that opinion also was authored by Mr. Justice

White, who recognized and even drew on the parallels between the two cases in writing the later opinion.

The Connecticut redistricting had been attacked on the grounds that it allowed too wide a population variation among districts and that the state admitted that it had deliberately attempted to create specific numbers of Democratic and Republican districts in rough proportion to the normal political party division within the state. Just as Justice Brennan saw New York's 1974 redistricting as "benign discrimination," the attorney who defended Connecticut's action had, on at least one occasion, referred to the redistricting as a kind of "benevolent gerrymandering."

The plaintiffs in Connecticut had charged, among other things, that this deliberate political structuring violated the rights of minorities: Democratic minorities in districts which the state had preordained would be Republican and vice versa. But the Supreme Court ruled that such "benevolent, bipartisan gerrymandering" was not merely permissible but that it was also commendable. "The very essence of districting," said White, "is to produce . . . a more 'politically fair' result than would be reached with elections at large. . . . (N)either we nor the district courts have a constitutional warrant to invalidate a state plan . . . because it undertakes, not to minimize or eliminate the political strength of any group or party, but *to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls*. . ." (emphasis added). And in reply to the complainants' charge that the state's efforts to ferret out pockets of each party's strength had necessarily resulted in many grotesquely shaped districts, White wrote that ". . . compactness or attractiveness have never been held to constitute an independent federal constitutional requirement for state legislative districts." In other words: "yes, you may gerrymander—to produce results which *we* deem desirable."

The logic of both the 1973 and 1977 rulings not merely sanctions but also virtually mandates gerrymandering, for political and ethnic groups are generally spread quite unevenly across a state or subdivision. The situation which gave rise to the *Gaffney* case provides a good illustration. The most heavily Republican area of Connecticut in most elections is Fairfield County, which is located in the extreme southwestern corner of the state. Democratic strength is scattered throughout other areas. Republican candidates frequently win heavy majorities in races in Fairfield, while Democrats win in many other areas, but generally by smaller majorities. Therefore, in order to create a number of districts which is in proportion to the normal statewide vote totals of the two major parties, it is necessary to seek out scattered pockets of Republican strength outside the Fairfield area and to string enough of them together to form legislative districts. Unless this is done, there is no way of "compensating" for the top-heavy Republican majorities in Fairfield. But doing so virtually requires the construction of districts with contorted, outlandish, geographically illogical shapes.

The remedy sanctioned by the 1977 decision—the deliberate carving out of districts to create seats for specified ethnic minorities—raises yet another problem. This remedy is feasible only because the minorities in this instance happen to be geographically compact. But what about minorities which may have been subject to discrimination but which are not gathered together in discernible enclaves? It would be virtually impossible to establish districts for groups which might even form a larger proportion of an area's population than the ones at issue in this case but which were geographically dispersed. How could such a remedy protect them?

The chief Justice's dissent touched briefly and peripherally on this point:

> The result reached by the Court today in the name of the Voting Rights Act is ironic. The use of a mathematical formula tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshalling particular racial, ethnic or religious groups in enclaves. It suggests to the voter that only a candidate of the same race, religion or ethnic origins can properly represent that voter's interests, and that such candidate can be elected only from a district with a sufficient minority concentration.

The very concept of "benign gerrymandering"—of "affirmative action" in the establishment of electoral district boundary lines—poses issues which go to the heart of the function of districting. Districting is the process of dividing a geographic area into separate pieces, each of which then is apportioned one (or more) representative(s) in a legislative body. It is a function of a system of representation based on geography. But the idea of affirmative action, whether applied in this or any other context, is based on something quite different: on specific groups within a community, regardless of where the individual members of that group may reside. And affirmative action, as that term has come to be used, necessarily requires the use of a group quota. Such a quota is relatively easy to apply if one is dealing with proportions only.

Thus, a racial quota could easily be superimposed on a legislative body which is elected by a system of proportional representation. It could simply be required that a particular group's proportion of the total population be reflected in the membership of the legislative body. But to attempt to apply a quota to a legislative body which is geographically based (as are the U. S. Congress and every one of the state legislatures) is to mix two fundamentally incompatible concepts. If we are to have proportional representation of groups, perhaps we should consider scrapping the idea of geographic representation altogether: do away with districts and elect our lawmakers on an at-large basis, using a PR system.

The approach of the Supreme Court attempts to create a kind of hybrid system which in the long run cannot properly perform the function of either geographic or proportional representation. To attempt to superimpose one system—one concept—on the other makes gerrymandering unavoidable. And "affirmative gerrymandering," like any other form of that ancient and dishonorable practice, produces a deliberate and highly undemocratic distortion in the way the legislative representation system operates. Any form of gerrymandering means that those who draw the district boundary lines have attempted to predetermine the ethnic (or political) composition of the legislative body. To the extent that they succeed, the power of the voters has been preempted by the map makers.

The approach underlying the idea of "benign" or "benevolent" gerrymandering is fundamentally elitist in nature, for it assumes that those with the power to draw the lines (or those with sufficient judicial or legal authority to dictate to the line drawers) are wise and fair and benevolent enough to be entrusted with the power to preordain the ethnic or political complexion of the legislative branch of government, and, therefore, indirectly, the fate of all legislation. Under this concept, the people in effect delegate a significant portion of their authority over how they are to be governed to some disinterested authority presumed to have the wisdom to know what is best.

If this approach is rejected, however, one is still left with the question of how to prevent one ethnic or political group in control of the districting process from carving out districts in such a way as to create a disadvantage for other groups.

The most effective way to prevent gerrymandering, both affirmative and negative, is not to impose arbitrary quotas; nor is it to vest special power in some judicial umpire or even in a nonpartisan authority. Rather, it is to make sure that whoever draws the district lines cannot do so in a manner calculated to bestow special advantages on any ethnic group, any political party, any partisan faction, any favored candidates or any geographic area. And the best way to do this is to establish firm, explicit, politically and ethnically neutral guidelines or groundrules. Such rules would eliminate the discretion held by those who draw the lines, and it is precisely that discretion, that ability to make a judgment as to where district boundaries shall be placed, and who will be helped and who will be hurt, which is the very essence of gerrymandering.

Politically and ethnically neutral criteria (such as equality of population, geographic compactness to the greatest degree achievable, geographic contiguity and avoidance of needless crossing of boundaries of existing political units) would make it impossible for whoever draws the district lines to do so in a way designed to minimize the political power of any group.

Such provisions, properly enforced, eliminate the possibility of any type of gerrymandering by precluding any deliberately built-in advantages or disadvantages for anyone. They do not, of course, absolutely guarantee that each ethnic or political group will end up with a proportionate share of the seats; instead, they let the political chips fall where they may. In so doing, they allow the political process to work as it ought to work: with neutral rules to make sure that the game is played fairly.

The way to eliminate one evil is not to substitute a counter-evil. The way to preclude the imposition of special disadvantages on any group is not by bestowing compensating advantages on them later, to the consequent disadvantage of others who may be innocent bystanders. Rather, it is to make absolutely certain that no special, unwarranted advantages or disadvantages can be imposed by any group or against any group in the future.

As in other areas to which it has been applied, affirmative action in districting seems to create at least as many and perhaps more problems as it is intended to solve.

Choosing a Representation System: More than Meets the Eye

by Howard D. Hamilton*

There can be no universally best way of structuring a city council, because the specific characteristics of each city are important factors. An intelligent choice of an electoral-representation system requires consideration of a city's political traditions and other elements of its political culture, of the system's mesh with other political structures, and of the institutional context within which the polity functions.

Representation is a complex matter. Basic questions are representation of whom to do what, but there is a host of other significant considerations. The issue is more than district vs. at-large election of council members, as it also involves decisions about election methods—partisan or nonpartisan, plurality or limited voting, or some variant of proportional or minority party representation.

Additionally, more than representation should be evaluated in the selection of an electoral-representation system, because any change of system almost certainly will have other significant consequences, including some unforeseen ones. The other important considerations to be analyzed and assessed include the impact on the electoral opportunity structure and the caliber of council members and their orientations, any effects on political parties, the compatability of the electoral-representation system with other structures such as the council-manager system, or its compatability with other institutions such as neighborhood councils. Representation is not alpha and omega, the only important value.

The assortment of electoral-representation arrangements in American cities may be conceptualized as ranging along a continuum from the ward politics model of a large council elected by districts in partisan elections to the municipal reform model of a small council elected at large in nonpartisan elections. The emphasis of the ward politics model is representation of local and particular interests. The reform model fosters representation of less particular interests and of those with no geographical concentration, more attention by the electorate to city issues and to the qualifications of candidates rather than party labels, a stronger council and rational decision making.

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The writer's study of this subject in Cincinnati was to answer the question, "What would be the probable and possible effects, both immediate and long range, if Cincinnati were to switch from at-large election of members of the city council to elections by districts?" The effort to grapple with that question included investigation of the effects in three comparable sized cities (Dallas, Indianapolis, San Francisco) which switched to districts during the last decade (*Electing the Cincinnati City Council*, Stephen H. Wilder Foundation, 1017 Provident Tower, Cincinnati 45202, 1978, 124 pages, $3.00). Cincinnati's structure approximates the municipal reform model, but it deviates in the fundamental respect of having partisan elections in combination with a nonpartisan ballot.

Interest in districts was sparked by the failure of any black candidates to win seats in the 1975 election. That was one product of the shift in 1957 from proportional representation election to the "9X" system (vote for any nine candidates for the nine seats). Black candidates fared very well during the PR era, but never as well afterward. The 1975 shutout was the joint result of the 9X system and the coincident retirement of a veteran black councilman and the resignation of the other one. The young black nominees for their seats lacked the prominence required for victory in the at-large plurality election. A black candidate did win in 1977, however, and shortly thereafter another received a vacancy appointment. The 1981 election may be an acid test for the at-large 9X system, after the census confirms that blacks are essentially a third of the populace.

Districting would be less advantageous for blacks in Cincinnati than in most cities, because the black population is more dispersed. If "safe" districts (at least 60 percent black) were drawn, approximately 30 percent of the blacks would live outside those districts. The optimal arrangement for black voters and black politicians would be the Hare PR system as before 1957.

Five district maps were drawn to assess the effects of districting and various combinations. Two maps were drawn with six districts, one to maximize population equality, compactness and adherence to neighborhood boundaries, the other to maximize the election prospects of black candidates. Similarly, two maps were drawn with nine districts, and another with 10 districts drawn to benefit black candidates. Those maps enable one to estimate the number of seats likely to be won by black candidates under 10 arrangements: nine and 10 districts with color blind districting, and the same drawn to maximize election of blacks; combinations of 6-3, 8-7 and 10-5, also districted both ways.

The likely results may be compared with 9X elections. Ten districts is the only arrangement that would guarantee significantly more black council members (20 percent) than the 11 percent of the 1977 election. Each of the systems would produce more than 11 percent if the districts were drawn to maximize the number of "safe" black seats. With nine districts there could be two "safe" and one racially balanced district. With 10 districts there could be three "safe" black districts. Combinations would be the least favorable arrangement for blacks, because of the improbability of winning any of the at-large seats.

A rational choice by blacks between alternative schemes involves more than how many black candidates are likely to be elected. It also requires consideration of the trade-offs, i.e., the costs. Districting would be disadvantageous to the blacks outside the black districts, and to some black politicians. District council members, black and white, would have less political stature. And, most importantly, blacks would lose their strategic position in Cincinnati elections. They now exert considerable or decisive influence on which white politicians reach city hall.

There are other trade-offs that concern both blacks and whites. An at-large council member has to be a moderate. With districts, white candidates would have no electoral incentive to be concerned about black interests. The moderation of Cincinnati politics may be less a product of fortune than of the election system. Another consideration is that districting would "ghettoize" Cincinnati elections. An additional one is the controversy that might occur about districting criteria. If "safe" black districts were selected as a guideline, another issue might appear. Should any other group be entitled to districts, e.g., Appalachians?

Some characteristics of Cincinnati elections are superior to those in most large cities. There is vigorous party competition and less irrelevant rhetoric than one might expect for intensely competitive elections. The quality of most party nominees is good, so that there is no occasion for anxiety about the competence of the next council. Party is the foremost determinant of voting, but there is little blind party voting.

There also are serious weaknesses. The voting rate is distressingly low, campaigns are expensive, recent elections have been rather issueless, and hence name recognition is excessively important, which helps make incumbents nearly invincible and handicaps black candidates.

The average reported campaign expenditure in the last two elections was $15,000 per candidate, $18,000 per party nominee, and $21,500 for the winners. That is substantially less than for the 1977 San Francisco district election and substantially more than elections in Dallas and Indianapolis. Districting in those cities reduced the average candidate expenditure as the aggregate outlay increased. Curiously, the campaign expense has some side benefits. It prevents the ballot from being overloaded with self-starters, and enables the political parties to be successful nominators and to make council elections partisan contests rather than only beauty contests.

The parties make an effort to invoke issues by rather comprehensive and explicit platforms, but issues are obscured in the free-for-all nature of the campaign, with each candidate talking about whatever occurs to him. Logic and the experience of Dallas and San Francisco indicate that districting would add another obstacle: campaigning would have less focus on citywide matters. It should be noted that Cincinnati is not unique; few local governments are models of the mandate theory of elections.

Only 44 percent of those eligible voted in the 1977 election. Logically, the effect of districting should be less voting because of less party competition, and such was the experience of San Francisco and Indianapolis. Nonvoting is a cause for concern in Cincinnati but not for embarrassment, as its voting rate is higher than for most cities.

The electoral success rate of incumbents since 1957 has been 89 percent. Would it be less with districting? Logically not, because most districts would not have keen party competition. Incumbents continued to win after districting in Dallas and San Francisco. For all the large cities of the nation the incumbent success rate is 84 percent.

The reelection rate poses the same questions. What is the nature and quality of accountability? And how would accountability be affected by districting? District advocates assert that at-large council members are unaccountable and that the remedy is districts. Their opponents assert that accountability is better when the council member is answerable to all the voters of the city. The nub of the matter and the root of the disagreement is "accountable to whom, for what?"

A familiar theme is that a high reelection rate is proof of weak accountability. The reasoning is that a high reelection rate produces electoral security and indifference to constituent preferences. That logic is not applicable to the Cincinnati council, where the reelection rate has not been accompanied by a sense of security. Incumbents campaign as vigorously as other candidates, necessarily, because the competition is three-dimensional: between parties, between incumbents and challengers, and between incumbents.

A less familiar argument is applicable in Cincinnati. To some unmeasurable extent, accountability is vitiated by the fact that an incumbent's record may be obscure in the large field of at-large elections, and there is less probability that his record will be spread before the voters by an opponent, as might occur in district elections.

Most controversy about whether a council is or is not accountable has an inarticulate major premise: accountability is defined operationally as responsiveness to some set of demands and interests. Judgments about accountability usually hinge on the question of what should be the ordering of categories of demands and interests. System choice is related to the ordering of demands by councils, and to whom a council member will feel most accountable. Particularisitic interests rank higher for a district than for an at-large councilman, who has an incentive to give more weight to broader interests and more consideration to the question of which interests are most congruent with his perceptions of the good of the city.

Analysis of 1977 election data indicates that with the two-way competition of the last decade, districting would have less effect on party fortunes than some politicians anticipate, but the data provide no preview of what would occur if the Charter-Democratic coalition were to dissolve and three-way competition were to resume.

The analysis shows important effects on the party system: an absence of close party competition in most districts, several solid coalition districts and two strong Republican districts. That would affect the opportunity structure, adversely for Charter and Democratic politicians residing in Westwood or Hyde Park and Mt. Lookout, and for Republicans residing elsewhere. It would change the Republicans from a citywide party to the Westwood and Hyde Park party.

Districting would erect formidable obstacles to maintenance of the Charter-Democratic coalition. Numerous politicians predict that the coalition would cease and thereafter the Charter party would be annihilated. Hence, system choice involves a judgment about the value of the Charter party, intrinsically and as an element for preserving party competition.

Effective party competition is nearly an extinct species in large cities; its continuance in Cincinnati is not written in the stars. System choice involves a judgment about the value of effective party competition. There is considerable reason to believe that it is valuable for large cities and that each of Cincinnati's parties contributes to making its government representative. Both logic and Cincinnati's experience of 30 years indicate that the system most favorable to the maintenance of party competition is proportional representation.

The premise of council-manager government is that the council shall be a strong legislature; it is the lynch pin. Hence, system choice for Cincinnati involves judmgents about how the alternatives relate to the quality of council members as decision makers, their collective capacity for rational decision making, and the fit of each alternative with a council-manager government.

The abundant data about the quality of council members since 1925 are not ambiguous. At-large election, party competition and the absence of an overshadowing mayor have made Cincinnati's council exceptionally important, and the quality of its membership has been remarkable. Districts would diminish the importance of council seats, weaken party competition and possibly generate pressure for elevating the mayor.

Districting would change the opportunity structure in numerous ways, some of which are discernible. It would increase the opportunity of candidates with less access to funds or less extensive reputations, for those with less moderate views or rhetoric, and also for black candidates if districts were drawn for that purpose. There would be some corresponding diminution of opportunity for the types that have been nominated by the parties and elected; to some extent this is a zero sum game. It probably would increase the opportunity for "locals"—long-time residents and members of old families—at the expense of "cosmopolitans," the types that have been prominent in the council. It also would have the aforementioned geographical effects on Democratic, Republican and Charter politicians according to their residence. Whether the overall effect would be a net expansion or contraction of the opportunity structure is unpredictable.

The effects of districting on the council's capacity for rational decision making would be partially a function of the effect on the caliber of council members but also the effect on their orientations. The hypothesis that at-large election is more likely to produce an orientation appropriate for rational decision making has not been investigated by scholars. There is only fragmentary evidence, such as the contrast between the Cincinnati council and Cleveland's, and the judgments of experienced officials, that an at-large council is more capable of establishing priorities, developing long-range plans and carrying them through.

Another premise of council-manager government is cooperative relationships between the two organs. One would expect some stresses with district elections to the extent that council members become advocates for their bailiwicks. An effect of districting in Dallas was the generation of substantial tension between the manager and council members. At-large election evidently is not a sine qua non for satisfactory council-manager relationships, as there are several manager cities with districts. Logic and the Dallas experience, however, indicate that a district-based council is not as good a fit with council-manager government.

A prominent characteristic of the district system is the volume and variety of constituent services by a councilman. Cincinnati's council members also are ombudsmen on a big scale, but the scope may be restricted. An at-large councilman possibly has less incentive to seek favoritism or to exert excessive pressure on city departments. Districting might expand the scope of constituent services, but ombudsmanship is not a neglected function in Cincinnati.

The burgeoning neighborhood organizations of Cincinnati provide very extensive linkage between the council and the citizenry. Visitors may be surprised by the number of neighborhoods and the intensity of neighborhood identification. Officials and politicians scramble to pay fealty to the neighborhoods. A questionnaire answered by 51 officers of community councils confirmed that they are major channels of communication and consultation. The interaction is at a high level, and all but a few neighborhood leaders characterized their relationships with the council as good or satisfactory. Does the combination of ombudsman services by council members and the network of community organizations provide satisfactory linkage, or is a district system needed?

"Do you favor electing the nine members of the city council on an at-large basis or do you favor election by districts?" Some respondents prefer a combination. The volume of at-large choices was greater than the sum of the districts and combination choices. Some that prefer districts view the city council as insufficiently sensitive to the welfare of lower status people, while others say the very opposite.

In explanation of their choices, some neighborhood leaders assert that community organizations and an at-large council are complementary structures, each needing the other, and that together they constitute a balanced and viable system. Their reasoning is that the neighborhood councils are rivals for resources and have other conflicts; the at-large council can be impartial. "To add district competition would escalate the struggle and divide the city. With at-large election, council is the balance which measures needs against community resources and provides city-wide equity." If that logic is sound, the more neighborhood government develops, the more valuable is an at-large council as a counterpoise to the centrifugal forces and as an integrating institution.

Milton Kotler has advanced the proposition that district-based councils are less hospitable to the development of neighborhood government. At-large council members are less likely to perceive neighborhood governments as competitors and political threats. Instead, they may view them as helpful and desirable, the attitude of Cincinnati's council members. The effect of districting in Indianapolis was consistent with Kotler's hypothesis. The new Indianapolis council petitioned the legislature to repeal the "Minigov" statute. It was not repealed, but it remains a dead letter because of the council's opposition.

A patent advantage of districting is that every citizen has a specific council representative, but that coin has two sides. With at-large elections, citizens get to vote on all the seats and any citizen has a good chance of finding some council member with a receptive ear. Most community councils work with several council members, and some of the community patriots regard that as an important asset.

The intensity of neighborhood identification and the vitality of the community councils present a set of questions. Are the present structures satisfactory, would a districted council be better, and how far does Cincinnati wish to go down the neighborhood government road?

There are three basic options for Cincinnati: the 9X system, districting with or without some at-large seats, or the Hare PR system that prevailed for 30 years. Any systemic change will have significant side effects. An intelligent selection in any city cannot ignore the experience, the political culture, the demography, the other political structures, the institutional context of the polity and other characteristics of that city.

[APPENDIX III]

LEGAL MEMORANDUM BY ANTHONY TROY ON CONSTITUTIONALITY OF THE VOTING RIGHTS ACT

III. THE CASE FOR UNCONSTITUTIONALITY

A. Constitutional provision involved

Congress based its power to prescribe the federal controls in the Voting Rights Act on the second section of the fifteenth amendment. Section 1 of that amendment provides that: "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Section 2 adds: "Congress shall have power to enforce this article by appropriate legislation."

That second section must form the basis for any attack on the Voting Rights Act. The Supreme Court held in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), that a state does not itself have standing to challenge the Act under the Due Process Clause of the fifth amendment, the Bill of Attainder Clause of Article I, or the principle of Separation of Powers. Nor does a state have standing as the parent of its citizens to invoke those constitutional provisions against the federal government, 383 U.S. at 323–24. To the extent those provisions are relevant, the Court held they may be considered:

> "only as additional aspects of the basic question presented by the case: Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the states?"
>
> 383 U.S. at 324.[1]

B. General overview

The Supreme Court's reaction to Virginia's constitutional arguments will depend primarily on its perception of the intrusion imposed by section 5. In the view of Congress, Section 5 did no more than impose a slighty administrative inconvenience on the states. *See 1975 House Hearings* at 760–62 (questions posed by Congressman Parker to Attorney General Miller and Deputy Attorney General Troy). So long as Congress viewed section 5 in that way—simply as a matter of administrative convenience—it was quite easy to extend the controls imposed by that section with very little consideration of the basis or the need for those controls.

If the Court views section 5 in much the same way as Congress, its reaction is likely to be the same. The Court traditionally defers to the legislature, unless it considers some fundamental principle to be involved.[2] Virginia must impress on the Court that section 5 of the Voting Rights Act does intrude on fundamental constitutional principles, and that close scrutiny of the legislative scheme is required.

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[1] Although the Court defined the question strictly in terms of § 2 of the fifteenth amendment, it appears that the basic principles incorporated in the other constitutional provisions mentioned—including the principle of equal protection—would enter into the Court's determination of that question. The term "appropriate' in § 2 of the fifteenth amendment is certainly as broad as the "due process" language of the fifth amendment which, the Court has held, includes equal protection guarantees. See *Johnson* v. *Robinson*, 415 U.S. 361, 364–65, n. 4 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618, 641–42 (1969); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). *See also Griswold* v. *Connecticut*, 381 U.S. 479 (1965) in which Justice Douglas indicated that constitutional provisions must be read together and that specific constitutional guarantees "have *penumbras*, formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484.

[2] Perhaps the strongest statements of judicial deference are found in the opinions testing legislative classification in the economic field under the Equal Protection Clause. The Court will sustain the classification if "any state of facts can be conceived of" that would support it—even though the legislature itself might not have considered those facts. *See, e.g., McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961); *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78–79 (1911). Under that standard the Court has upheld classifications which, at least on their face, appear blatantly discriminatory. *See Goesart* v. *Cleary*, 335 U.S. 464 (1948) (permissable to prohibit women from serving liquor, unless the barmaid's father owns the bar); *Knotch* v. *Board of Pilot Comm.*, 330 U.S. 552 (1947) (permissable to confine pilotage on the Mississippi River only to relatives of previous pilots).

On the other hand, where the Court considers the classification to involve fundamental principles, such as the right to vote or to travel, it is quite willing to substantiate its own judgment for that of the legislature. In those cases the Court demands, and rarely finds, a "compelling interest" to sustain the classification. *See e.g., Kramer* v. *Union Free School Dist.*, 395 U.S. 621 (1969); *Levy* v .*Louisiana*, 391 U.S. 68 (1968).

C. Nature of the intrusion

Section 5 does involve far more than just questions of administrative conveniences. That section poses the most basic questions concerning the role intended for the States by the Constitution. The right of a state to govern itself in local matters without begging prior approval from federal administrative officials would seem to be one of the predicates of our system of representative government. Indeed, as Justice Black pointed out in *South Carolina* v. *Katzenbach*, the power of prior review over state legislation was one denied by the framers of the Constitution even to Congress:

> "The proceedings of the original constitutional convention show beyond all doubt that the power to veto or negate state laws was denied Congress. On several occasions, proposals were submitted to the convention to grant this power to Congress. These proposals were debated extensively and on every occasion when submitted for vote they were overwhelmingly rejected." 383 U.S. at 360–61.

Yet, Congress—denied that power itself—in section 5 of the Voting Rights Act has delegated that same power to intrude into the state legislative process to others. Moreover, that intrusion occurs not in an area within the primary domain of Congress under the Constitution, such as commerce, but in an area where primary power traditionally and under the Constitution belongs to the States.

The Supreme Court has consistently recognized that primary power over voting—to determine the qualifications for electors and to set the procedures for elections—is granted by the Constitution of the States. For example, in *Carrington* v. *Rash*, the Court took care to note that:

> "There can be no doubt . . . of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution. . . . qualifications for the exercise of the franchise. Indeed, '[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.' . . . 'In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.' " 380 U.S. 89, 91 (1965), quoting from *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45, 50 (1959) and *Pope* v. *Williams*, 193 U.S. 621, 632 (1904).

The Court in recent years has emphasized the importance of the right to vote, and the inability of the States to restrict that right in a manner violating the specific prohibitions of the Constitution. Nonetheless, the Court has continually reaffirmed that primary power over voting rests with the States, not Congress. In *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), the Court struck down the provision of the 1970 Amendments to the Voting Rights Act reducing the voting age to 18 in state elections. Congress' power to enforce the Civil War Amendments by "appropriate" legislation, the Court found, did not grant Congress power to substitute its own judgment in the area of voter qualifications for that of the States. The power to fix voter qualifications at least in state and local elections is vested by the Constitution in the States:

> "It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendment have specifically narrowed the powers of the States." 400 U.S. at 125, at 294.

Indeed, four Justices in that case (Harlan, Stewart, Burger, and Blackmun) believed that the constitutional power of the States to set voter qualifications extended to federal elections, and that Congress was without power to invalidate states laws establishing voter qualifications even in those elections.

D. Basis for Upholding the section 5 controls in South Carolina v. Katzenbach

In upholding the constitutionality of the 1965 Voting Rights Act in *South Carolina* v. *Katzenbach*, the Court recognized that section 5 was an exceptional intrusion into state power. That section posed the only point of disagreement in the Court. Justice Black did not question the power of Congress, based on the extensive evidence of the actual manipulation of literacy tests, to ban those tests or to authorize the appointment of federal examiners. In his opinion, however, section 5 just went too far:

> "Congress has here exercised its power under § 2 of the Fifteenth Amendment through the adoption of means that conflict with the most basic principles of the Constitution. . . . Section 5, by providing that some of the States cannot pass State laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between State and Federal power almost meaningless. . . . A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country." 383 U.S. at 358, 360.

The majority did not disagree with Justice Black's characterization of section 5 or with his description of the potential impact of that section. It disagreed only with his conclusion that such a distortion of the federal system could never, under any circumstances, be justified. The Court upheld section 5, stating:

> "This may have been an *uncommon* exercise of Congressional power, as South Carolina contends, but the Court has recognized that *exceptional conditions* can justify legislative measures *not otherwise appropriate*." 383 U.S. at 334 (emphasis added).

In short, section 5 controls, although not otherwise appropriate and constitutional, were justified only by exceptional conditions. The Court found those exceptional conditions in the evidence before Congress of "pervasive" and "flagrant" violations of the fifteenth amendment primarily through the "discriminatory application of voting tests," 383 U.S. at 311. That evidence demonstrated further that where such discriminatory application of tests had been found, judicial decrees often were not alone effective to prevent the evil from recurring:

> "Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests. . . ." 383 U.S. at 314.

Section 5 was designed to prevent those states that had shown a bent for purposefully disenfranchising voters through the manipulation of voting tests from achieving the same result through other means after the tests were suspended. The Court found this to be an appropriate response by Congress "under the compulsion of these unique circumstances." 383 U.S. at 335.

E. Expansion of section 5 since South Carolina v. Katzenbach

The nature and degree of federal intrusion imposed by section 5 has increased considerably since *South Carolina* v. *Katzenbach*. That section has now been interpreted to require federal approval for every change in voting rules or procedures, no matter how minor or beneficial. *Allen* v. *State Board of Elections*, 393 U.S. 544 (1968). Moreover, that section has been extended beyond changes in voting rules and procedures to require prior federal approval for any state legislative change that could even arguably have an impact on black voting power. *See Perkins* v. *Matthews*, 400 U.S. 379 (1971). The District Court for the District of Columbia has even held recently that a state is not free to implement a legislative change after receiving approval from the Attorney General. Even after that approval, the state can be forced by a private party into the long and expensive process of defending its law before the court in the District of Columbia. *Harper* v. *Levi*, —— F.2d —— (U.S.. App. D.C., Nos 73–1766, 73–2035, July 24, 1975).

Perhaps most significant, it appears fairly clear now that even valid, constitutional state laws might not pass muster under section 5. Federal administrative and judicial officials under section 5 can review, condition, and even invalidate state laws which would not violate the strictures of the fourteenth or fifteenth amendments, and indeed which have been expressly held valid under those amendments. Compare *Holt* v. *City of Richmond*, 459 F.2d. 1093 (4th Cir. 1972), *cert. denied*, 408 U.S. (1972), and *Chavis* v. *Whitcomb*, 403 U.S. 124 (1971), with *City of Richmond* v. *United States*, U.S. (June 24, 1975). The consequences of that power must be drawn in focus. We have indicated that the Supreme Court in *Oregon* v. *Mitchell* held that Congress itself does not have the power in attempting to enforce the fourteenth and fifteenth amendments to invalidate state laws setting voter ages. Under section 5 of the Voting Rights Act, however, federal officials delegated by Congress are now given the power to invalidate just such state laws—even though passed by the state after lengthy consideration free of any impermissible racial motive.

It might be argued with some force that Congress—itself denied the power to invalidate constitutional state voting laws—cannot under any circumstances delegate that same power to others.[3] Of course, this is neither an appropriate time nor the appropriate case to raise an unconstitutional delegation argument. The important point here is simply that section 5 is indeed an extraordinary intrusion into state power justified, if at all, only by "exceptional conditions."

F. Basis for imposing section 5 controls on Virginia

The "exceptional" conditions found by the Court in *South Carolina* v. *Katzenbach* to justify imposition of section 5 controls simply did not exist in Virginia.[4] In its former action Virginia proved a total absence of any discriminatory application of its former literacy test. Without exception, that test—which was little more than a requirement that a prospective registrant sign his name and address—was applied in a completely fair and nondiscriminatory manner. That fact was never disputed by the Justice Department, and simply confirmed the conclusion previously reached by the U.S. Commission on Civil Rights in 1961 that blacks "encounter no significant racially motivated impediments to voting" in Virginia. In short, Virginia has proved that it was free from discrimination in its voting process once, and it is willing to do so again.

Virginia is subjected to intrusive federal control of its voting process not because of any manipulation of that process, but solely on the basis of past educational disparities. Disparities in such factors as pupil/teacher ratios, teachers' salaries and certifications, and value of school property, are presumed to have resulted in a significant, racially discriminatory abridgement of the franchise. Moreover, that presumption is irrebuttable. Virginia cannot even show that, in fact, an abridgement did not occur.[5] Educational disparities in themselves, and as a matter of law, are preclusive. Moreover, those educational disparities, which now form the basis for imposing section 5 voting controls on Virginia, did not take place in the 1960's or even the 1950's. Rather, it is sufficient under this new basis for section 5 controls that disparities existed at the first part of this century when a substantial portion of the electorate had gone to school.

G. Past educational disparities do not justify section 5 voting controls

The Voting Rights Act of 1965 was aimed at a specific and fundamental abuse—the discriminatory application of tests to bar blacks from voting. *See Hearings on H.R. 6400 before Subcom. No. 5 of the House Com. on the Judiciary*, 89th Cong., 1st Sess., Ser. 2 at 6–7, 16 (1965) ("1966 *House Hearings*") (testimony of Attorney General Katzenbach); *South Carolina* v. *Katzenbach*, 383 U.S. at 312, 331. The coverage formula in section 4(b) of the Act was carefully drawn to mark those areas where there was a significant danger that such discriminatory application of tests had occurred. *See* 1965 *House Hearings* 105; *South Carolina* v. *Katzenbach*, 383 U.S. at 329. And, "this was the evil for which the new remedies [of the Act] were specifically designed." 383 U.S. at 331.

Specifically, the Act imposed three special remedies on those areas where the discriminatory application of tests were presumed to have occurred: First, voting tests—the vehicle of discriminatory abuse—were prohibited. Second, in order to assure future fairness in the voting process, the Attorney General was authorized to appoint Federal Examiners. Third, because the Justice Department's experience showed that jurisdictions in which discriminatory administration of tests had been found often enacted new tests or similar devices to bar blacks from voting following a federal court order, an additional control was considered necessary. Accordingly, under section 5 of the Act those states that were presumed to have applied their literacy tests in a consciously discriminatory fashion were prohibited from changing their voting qualifications without prior federal approval. Section 5, in short, was specifically designed to prevent those states that had manifested an intent to consciously manipulate their electoral process to bar blacks from voting from achieving the same results through other means after their tests were suspended. Absent that intent—absent any evidence of affirmative discrimination in the voting process—section 5 controls are not justified.

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[3] The unconstitutional delegation argument might have some merit in an appropriate case. In *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), the Court held that Congress had the power under the enforcement clause of the fourteenth amendment to invalidate a specific state law with respect to voting which had not been, and probably would not have been, judicially held to violate the amendment. "That case," as Justice Stewart later said in *Oregon* v. *Mitchell*, "gave Congressional power . . . the furthest possible legitimate reach." 400 U.S. at 296. Even under the broad holding in *Morgan*, one might argue that if power to invalidate otherwise constitutional state law exists, it exists only in Congress and cannot be delegated to federal officials, whether executive or judicial. Indeed, as Professor Cox has pointed out, the justification for permitting Congress to "expand" the Constitution beyond the judicial interpretation is based precisely on the ability of Congress as a legislative body to assess and determine factual questions beyond the competency of the judiciary. A. Cox, *The Role of Congress in Constitutional Determinations*, 40 Cin. L. Rev. 199, 229 (1971).

[4] One might argue that even the same condition that justified the imposition of section 5 controls initially did not justify their reimposition in 1975—that discriminatory manipulation of voting tests in 1965 at the latest does not justify continuous federal supervision of the state voting process through 1982. That argument is for others to raise, however. In Virginia, there was no manipulation.

[5] Thus, Virginia's proof in its former case that far less than one percent of those applying were denied registration on account of the test, and that black registration almost doubled over the relevant period, was to no avail. The District Court, while commending Virginia "for its good faith efforts in voter registration in the sixties," found that Virgina had not, "*and probably cannot*, rebut the evidence that many potential black voters stayed at home and never even tried to register out of the fear of rejection. . . ."

The court recognized in *South Carolina* v. *Katzenbach*, that section 5 controls—involving such a basic intrusion into the power granted to the States by the Constitution—require more than just some conceivable, rational basis to be sustained. Rather, the legislature must demonstrate compelling and "exceptional" conditions to justify those controls. Here not even a logical basis can be found, however. One might argue that a certain logic would exist if Congress, on the basis of evidence of past educational disparities, were to impose prior federal review of all state legislation with respect to education. No logic can be found, however, in imposing prior review of voting legislation on a state that has demonstrated a total absence of any prior abuses in that process, solely because of disparities in education occurring in the state during the first part of this century.

The plain fact is that section 5 review of voting changes was specifically designed to deal with conscious discrimination in voting, not with educational or other types of discrimination. Educational disparaties—regretable though they are and no matter how relevant they might be in determining whether to eliminate literacy tests in the future—are simply not the type of affirmative and exceptional discriminations in voting that justifies federal intrusion into the state voting process.

Moreover, Congress recognized that fact—at least with respect to states not already covered by the Act.

Several amendments were offered during the 1975 debates to extend the impact of section 5 controls beyond the already covered jurisdictions. Senators Talmadge, Nunn, and Stennis offered amendments that would have extended those controls to all the states. Senator Stone offered an amendment to impose those controls on any jurisdiction in which the Attorney General found the situation serious enough to warrant suit under section 3 of the Act. Senator Tunney, floor manager of the Bill that was finally enacted, strenuously opposed those amendments, and they were rejected.

Senator Tunney repeatedly emphasized that Congress could constitutionally impose section 5 controls only on the basis of compelling and exceptional conditions showing serious violations of voting rights:

"Mr. TUNNEY. . . . It is clear from the majority opinion in South Carolina against Katzenbach . . . that you have to have a serious violation of voting rights in order to impose a special remedy such as preclearance. . . . The Chief Justice wrote:

"The act suspends new voting regulations pending scrutiny by Federal authorities. . . . This may have been an uncommon exercise of congressional power, as South Carolina contends; but the court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

"There is no indication that there are exceptional circumstances in other parts of the country so as to justify what is clearly an exception to the provisions of article I, section 4, of the Constitution." 121 Cong. Rec. S13360 (Daily edition July 22, 1975).

Senator Tunney specifically rejected the suggestion that educational discrimination constituted the type of exceptional condition that would justify section 5 voting controls:

"Mr. TUNNEY. . . . The Supreme Court has made it very clear that to have an intervention like that by the Federal government in the state election process there have to be exceptional circumstances. . . .

"*We are talking about voting discrimination here. We are not talking about educational discrimination or other forms of discrimination. We are talking about voting discrimination.*" 121 Cong. Rec. S13381 (Daily edition, July 23, 1975) (emphasis added).

Senator Tunney and others reaffirmed that point repeatedly in opposing the amendments to extend section 5 controls beyond the already covered states:

"Mr. TUNNEY. . . . I would like to point out . . . that in Oregon versus Mitchell, the Supreme Court struck down the 18-year-old vote as unconstitutional as it related to State elections. Preclearance is a much greater intrusion into the State election process.

"Almost certainly, this amendment is unconstitutional under the Oregon case. Now, the constitutional precedents are very clear that the only way we can have this kind of intervention by the Federal Government in local elections is if we have a severe constitutional abridgement of another right namely, the 15th amendment right to vote. . . .

"This has nothing to do with busing, this has nothing to do with economic discrimination of another kind in other parts of the country. There may be that discrimination, we all know it and none of us are hypocrites on that point. We know that on various matters.

"But voting rights have not been abridged the way they have in other regions of the country on the basis of race or on the basis of color." *Id.* At S 13384–85 (emphasis added).

Senator Brooke also emphasized that section 5 controls did not relate to educational discrimination:

"Mr. **Brooke**. . . . We are not talking about busing. We are talking about voting. . . .

". . . *we are not talking about busing, and we are not talking about school systems. We are talking about voting.* We are talking about the Voting Rights Act of 1965.

Mr. **Nunn**. If the Senator would read the court decisions, he would find that a device under this act, a part of the triggering mechanism, is defined as a dual school system.

Mr. **Brooke**. That is specious, as the Senator from Georgia very well knows. *Id.* at S 13385–86 (emphasis added).

That educational discrimination certainly existed in the areas not covered by the Act was admitted. As Senator Kennedy stated:

"There is discrimination in the North, as well as in the South. As the result of the finding of a judgment, the Federal district court in Boston, Mass., such discrimination was found in the public school system." *Id.* at S 13388.

Senator Kennedy emphasized, however, that the controls in the Voting Rights Act could only be justified by Discrimination of another type.

"The Constitution is quite clear in pointing out that determining the time, manner, and place of elections will be reserved for the several States. In reviewing those legal decisions which uphold the voting rights cases, it is quite clear that they stated that it was only with the obstruction of the basic and fundamental right to vote guaranteed by the 15th amendment, that the court has recognized the power of Congress to be able to initiate procedures or requirements that would strike down the various tests and devices and other voting procedures which have been used as means for discrimination." *Id.* at S. 13389.

Again as Senator Javits emphasized:

"The structure of the law depends for its constitutionality on the fact that there has been a history in given areas based upon the triggering device of patterns or practices of the denial of voting." *Id.* at S. 13395.

The view consistently stated above, that intrusive federal oversight of the state electoral process must be based on discrimination in that process, is correct. A State which is free of substantial discrimination in its electoral process cannot be subjected to section 5 controls because of past educational disparities—regrettable though they might be. And, that reasoning is certainly as applicable to States in the South, as in the North.[6]

H. The imposition of section 5 controls on Virginia is entirely arbitrary and inappropriate

As the statements quoted in the previous section indicate, Congress was well aware when it considered the 1975 Amendments, that educational inequality was not an exceptional circumstance confined just to the South. Indeed, Congress based its permanent ban on literacy tests primarily on the finding that educational inequalities were prevalent throughout the country. Whether defined in terms of unequal expenditures, segregated schooling, or unequal literacy rates, the problem of unequal educational opportunity is national in scope. Congress refused however, to impose section 5 controls on states in the North and West where that problem existed. That problem, it concluded, did not justify the far-reaching intrusion of federal control of the electoral process. It could not then, on the basis of that same condition, impose those controls on Virginia.

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[6] One might argue on the basis of the above statements that Congress did not intend to impose section 5 controls on Virginia solely on the basis of educational disparities, and that Virginia's proper remedy is not an orginal action in the Supreme Court but a new action under section 4(a) of the Act raising that contention. Of course, Virginia would not object to a Supreme Court holding that educational disparities do not bar relief to a jurisdiction otherwise free of discrimination in the use of its literacy test—whether that holding is based on statutory interpretation or on the extent of Congress' power under the Constitution. It would be inefficient in the long run, however, to force Virginia to sue again under section 4(a) of the Act. Whether the Act applies solely on the basis of educational disparities must finally be settled by the Supreme Court in any case. Moreover, it would be difficult to contend, despite the statements quoted in the text, that Congress did not intend that Virginia should remain covered by the Act. Attorney General Miller's proposed amendment allowing Virginia an avenue of relief was rejected. The point is that in rejecting that amendment and intending Virginia to remain under the Act, as the debates make clear, Congress was acting irrationally and arbitrarily.

Jurisdictions are exempted from or subjected to section 5 controls in the first instance as a consequence of the mathematical coverage formula in section 4(b) of the Act. That formula "triggers" section 5 controls with respect to any state or political subdivision that maintained a "test or device" and in which less than 50 percent of the total voting age citizens—black and white—had either registered to vote or voted in the Presidential elections of 1964 or 1968.[7]

That formula has never been justified simply as a mathematical line drawn by Congress to determine when section 5 controls should apply. The Supreme Court in *South Carolina* v. *Katzenbach* refused to hold that Congress had the power to place the sanctions of the Act on some jurisdictions, but not on others, simply on the basis of mathematical disparities in voting statistics. Rather, the Court upheld that formula precisely because it had been carefully drawn to mark just those areas where there was a significant danger of voting discrimination through the discriminatory application of literacy tests—the precise evil the Act was designed to correct. Specifically, the Court found that Congress had been confronted with evidence of such purposeful voting discrimination in the great majority of the states falling under the formula, and was "therefore entitled to infer a significant danger of the evil in the few remaining states and political subdivisions covered by § 4(b) of the Act." 383 U.S. at 329.

It was not enough to the Court, however, just that the formula was rational. States still could not be subjected to the sanctions of the Act simply on the basis of a mathematical formula. The formula in effect established a presumption that literacy tests had actually been applied in a discriminatory manner. But the states falling within the formula must be given an opportunity to rebut that presumption. As to those states—such as Virginia—for which there was no evidence of such purposeful manipulation of literacy tests, the Court stated that it was nevertheless permissible to impose the remedies of the Act "at least in the absence of proof that they have been free of substantial voting discrimination in recent years." 383 U.S. at 329–30. Moreover, the Court made it clear that the procedures for relief from the Act were not intended to be a nullity, stating that the burdens imposed by these procedures were "quite bearable." 383 U.S. at 332.

The Court's reasoning in upholding the statutory formula in *South Carolina* v. *Katzenbach* demonstrates that, as now applied to Virginia, that formula is inappropriate.[8] Whatever logic the formula had to make areas of actual voting discrimination, is not present with respect to educational discrimination.

As Congress has found, disparities in educational expenditures and in literacy rates, as well as segregated schooling, existed throughout the nation. If a distinction exists between the type of educational inequalities that occurred in those areas within the coverage formula that requires section 5 controls, and the type of inequalities that occurred in jurisdictions outside the formula that make those controls unnecessary. Congress has not suggested it. Nor can any such rational distinction be found.[9]

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[7] Virginia was "triggered" under that formula because the Attorney General determined that it maintained a literacy test, and because less than half of its total voting age population voted in the 1964 Presidential election. Over 50 percent of Virginia's voting age citizens were registered in 1964, and more than half actually voted in the 1968 Presidential elections.

The 1975 Amendments also triggered section 5 controls with respect to jurisdictions with a significant language minority if less than half the voting age citizens voted in the 1972 Presidential election. See *supra*, p. 1, n.

[8] It must be emphasized that Virginia does not contend that the Act's coverage formula is no longer appropriate to mark those areas where there is a significant danger that purposeful discrimination in the voting process had occurred. As the Court pointed out, the evidence before Congress showed that the great majority of states falling within that formula actually had engaged in such purposeful discrimination. The possibility exists that the others might have as well. Virginia, however, did not. Section 5 controls are imposed on it solely because of past educational disparities.

[9] It must be emphasized that no such valid distinction can be found in the types of school segregation. *De jure* segregation occurred both in states within the formula and in many states outside the formula. Moreover, to the extent that segregation is important because of its presumed impact on the ability to meet a literacy test, no rational distinction can be made between *de jure* and *de facto* segregation. Segregation, no matter what the cause, it is argued, has a presumed discriminatory impact on the franchise.

In short, the mathematical coverage formula in the Act was not intended to and does not mark out a distinct type of educational inequality particularly appropriate for section 5 controls. That formula was designed to indicate areas of flagrant and purposeful voting discrimination—the evil that the remedies of the Act were designed to strike—not areas of educational discrimination. With respect to educational inequalities the formula is simply an arbitrary mathematical line for treating the same problem differently in different jurisdictions.

As now applied, the coverage formula in section 4(b) of the Act is directly at odds with the Court's holding in *South Carolina* v. *Katzenbach*. The Court upheld the formula in that case not only because it marked those areas where the problem of voting discrimination was most likely to have occurred, but because it did not exempt other areas, known to Congress, where the same problem had also occurred.

South Carolina had attacked the formula for failing to trigger several states for which there was certain evidence of voting discrimination through means other than voting tests. Attorney General Katzenbach advised Congress that the racial discrimination in voting in those states, not involving the widespread use of the tests, did not require the extraordinary remedies of section 5 of the Act. Congress adopted that advice, and the Court upheld it:

"Congress had learned that widespread and persistent discrimination in voting during recent years has typically entailed the misuse of tests and devices, and this was the evil for which the new remedies were specifically designed. . . . Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience. . . . *There are no states or political subdivisions exempted from coverage under § 4(b) in which the record reveals recent racial discrimination involving tests and devices. This fact confirms the rationality of the formula,"* 383 U.S. at 331 (emphasis added).

The record before Congress in 1975 was quite different. To the extent that educational inequalities are considered "racial discrimination involving tests and devices", the record before Congress in 1975 revealed such discrimination in the great majority of state exempted from coverage under section 4(b). With respect to that discrimination, the coverage formula does not distinguish between distinct phases of the problem, but treats the same problem in different ways.

The Justice Department might contend that the language used by the Supreme Court to uphold the Act's coverage formula in *South Carolina* v. *Katzenbach*, was largely gratuitous and that, although not called upon to do so in that case, the Court could just as well have held that the 50 percent figure in the formula was itself an appropriate basis upon which to key section 5 controls. The Department might make two arguments to support that position.

First, the Department might argue that 50 percent voting paricipation is relevant to the problem of voting discrimination. Voting participation at least 12 percent below the national average does indicate a problem that Congress was empowered to address.

Second, the Department might argue that even if the formula is nothing more than a mathematical line for dealing with only a part of the same problem, Congress was authorized to draw that line. Congress might well have decided that national application of section 5 controls would impose too great an administrative burden upon the Justice Department.[10] Moreover, the remedies Congress did enact, the Department would argue, are not invalid merely because Congress have gone further. *See McGowan* v. *Maryland*, 366 U.S. 20 (1961) (upholding a Maryland statute which exempted retailers in certain counties from the statewide prohibition of sales of certain articles on Sunday); *Salsburg* v. *Maryland*, 346 U.S. 545 (1954) (upholding Maryland law making illegally obtained search and seizure evidence admissible in only certain counties of the state); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955) (refusing to invalidate an Oklahoma statute imposing certain requirements upon opticians but not upon sellers of ready-to-wear glasses); *Railway Express Agency, Inc.* v. *New York*, 336 U.S.

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[10] Senator Tunney's primary argument in opposition to the extension of section 5 controls could not constitutionally be based on the type of discrimination—including educational discrimination—found in the uncovered states. He did argue, in addition, that extension of those controls to other states would unduly tax the administrative resources of the Department of Justice. 121 Cong. Rec. S13371 (daily ed. July 23, 1975).

106 (1949) (upholding a New York City traffic regulation prohibiting advertising on trucks except for advertisements of products sold by the owner of the truck).

There are several answers to these arguments.

First, with respect to the argument that the 50 percent figure is itself relevant to voting discrimination:

1. Of all the figures that might have been chosen by Congress, the one contained in the formula is the least relevant to voting discrimination. That figure is not directed at the registration or voting participation of any particular race. Rather, a state is triggered by the Act if less than half of its *total* voting age citizens voted. In Virginia in 1964, far less than half of the white voting age citizens voted. 1965 *Senate Hearings*, at 1472: "What Happened To the South?", Release of the Southern Regional Council, Inc., at 11 (November 15, 1964). Virginia, in short, would have been triggered by the formula even if not a single black resided in the state.

2. Statistics showing the gap between black and white registration or voting might arguably be relevant. In that respect, however, Virginia stands up quite well compared to the rest of the nation. The registration rate of black citizens in Virginia was 10 percent lower than the rate among whites just prior to the enactment of the Act. 1975 House Hearings at 242–43 (Ex 17 & 18 to testimony of Assistant Attorney General Pottinger). But there was a differential of 11.5 percent in the nation as a whole in 1966, the year following passage of the Act. U.S. Bureau of the Census, Current Popuation Reports, Series P–20, No. 208 (1970). Moreover, the gap between black and white registration and voting rates in areas exempted from the Act's coverage was actually greater than that in the South. In 1972, there was a differential between black and white voting rates of 10.8 percent in the North and West, and of 9.2 percent in the South. In that same year the gap between black and white registration rates in the North and West was 7.9 percent, but only 5.8 percent in the South. U.S. Bureau of the Census, Voting and Registration in the Election of November 1972, Series p. 20, No. 253 (1973). In short, voting statistics, if they are by themselves relevant to trigger section 5 controls, indicate that the Act is misapplied.

Second, with respect to the argument that Congress is empowered to remedy only those parts of a problem that, for reasons of scarce resources or for some other reason, it wishes to address:

1. The cases relied upon to support that argument could be distinguished on their facts. Justification could be found for the classification made by the legislature in each of those cases. Indeed, the Court in *South Carolina* v. *Katzenbach* cited the decisions in *Lee Optical* and *Railway Express* to support its conclusion that Congress, in enacting the Voting Rights to deal with the primary problem of discriminatory application of voting test, did not have to deal directly with discrimination not involving such tests. Distinguishing between states on the basis of whether or not they employed a literacy test is a far cry, however, from drawing a line between states, each of which employed a literacy test and engaged in educational "discrimination", solely on the basis of whether more than 50 percent of their total voting age population voted in a particular election. The second classification is nothing but mathematical.

2. More important, the several cases relied upon deal with the area of economic regulation. In that area the Court has traditionally, and quite properly, deferred to the legislative classification if any reason can even be conceived of that would justify it.[11] Such deference to the legislative is not appropriate here, however. Section 5, providing for prior federal review of state legislative action intrudes on the most fundamental rights granted the States by the Constitution. As the Court held in *South Carolina* v. *Katzenbach*, that intrusion must be justified by compelling and "exceptional" circumstances. Certainly, the convenience of the Justice Department is not sufficient. Indeed, the Court recently rejected administrative convenience as a justification where far less basic principles were involved.

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[11] Even in the area of economic regulation, however, there is some limit on the Court's deference to the legislature. In *Morey* v. *Doud*, 354 U.S. 457 (1957), the Court invalidated an Illinois statute that exempted a specifically named company from regulations on the sale of money orders. *See also Dukes* v. *New Orleans*, 501 U.S. 706 (5th Cir. 1974); *Adams* v. *Park Ridge*, 293 F.2d 585 (7th Cir. 1961).

In *Cleveland Board of Education* v. *Lafleur*, 42 U.S.L.W. 4186 (1974), the Court struck down School Board rules that required pregnant teachers to take maternity leave for a fixed period before and after delivery, Justice Stewart speaking for the majority, stated:

"The school boards have argued that the mandatory termination dates serve the interest of administrative convenience since there are many instances of teacher pregnancy, and the rules obviate the necessity for case-by-case determinations. Certainly, the boards have an interest in devising prompt and efficient procedures to achieve their legitimate objectives in this area. But as the Court stated in *Stanley* v. *Illinois* . . . '[*T*]*he Constitution recognizes higher values than speed and efficiency.*' " *Id.* at 4190–91 (emphasis added). *See also Vlandis* v. *Kline*, 412 U.S. 411 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

3. There is another reason, perhaps the most important, why close scrutiny of the legislative scheme is particularly necessary here. The danger of just such legislation as this was alluded to by Justice Jackson in his concurring opinion in *Railway Express:*

"The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and *thus to escape the political retribution that might be visited upon them if larger numbers were affected.*" 336 U.S. at 112–13 (emphasis added).

It can be strongly argued that Justice Jackson's warning was never more directly in point. By restricting the special burdens of the Act just to a minority of its member states, the majority in Congress has isolated itself from political retribution and political responsibility for its actions. The classification Virginia complains of is not only arbitrary in itself, it is the vehicle by which arbitrary action is allowed to continue. Conversely, so long as the impact of the Act is arbitrarily restricted to just a minority of the states, Virginia has no effective voice in Congress to argue its case. It is precisely in this situation that careful review of the Congressional action is not only appropriate—it is necessary.

[APPENDIX IV]

NUMBER OF CHANGES SUBMITTED UNDER SEC. 5 AND REVIEWED BY THE DEPARTMENT OF JUSTICE, BY STATE AND YEAR, 1965 TO SEPT. 30, 1980

State	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	Total
Alabama	1	0	0	0	13	2	86	111	60	58	299	349	153	146	142	262	1, 682
Alaska [1]	0	0	0	0	----	0	0	0	----	----	0	3	0	25	1	1	30
Arizona [2]	0	0	0	0	0	0	19	69	33	28	52	228	180	311	163	552	1, 635
California [3]	----	----	----	----	----	0	0	6	1	5	0	382	99	105	8	57	663
Colorado [3]	----	----	----	----	----	----	----	----	----	----	0	12	4	34	147	31	228
Connecticut [4]	----	----	----	----	----	----	----	----	----	0	0	0	0	0	0	0	0
Florida [3]	----	----	----	----	----	----	----	----	----	----	1	57	8	46	28	22	162
Georgia	0	1	0	62	35	60	138	226	114	173	284	252	242	444	371	600	3, 002
Hawaii [3]	0	0	0	0	0	0	0	0	0	0	0	6	0	0	0	3	9
Idaho [3]	0	0	----	----	----	0	0	0	0	0	0	0	0	0	0	1	1
Louisiana	0	0	0	0	2	3	71	136	283	137	255	303	460	254	336	313	2, 553
Maine [4]	----	----	----	----	----	----	----	----	----	0	0	3	0	0	0	0	3
Massachusetts [4]	----	----	----	----	----	----	----	----	----	0	0	11	0	3	0	0	14
Michigan [4]	----	----	----	----	----	----	----	----	----	----	0	1	0	0	0	0	1
Mississippi	0	0	0	0	4	28	221	68	66	41	107	152	114	126	112	105	1, 144
New Hampshire [4]	----	----	----	----	----	----	----	----	----	0	0	0	0	0	0	0	0
New Mexico [3]	----	----	----	----	----	----	----	----	----	----	0	65	----	----	----	----	65
New York [3]	----	----	----	----	----	0	4	----	----	84	78	106	96	72	27	24	491
Oklahoma [3]	----	----	----	----	----	----	----	----	----	----	0	1	0	0	----	----	
North Carolina [3]	0	0	0	0	0	2	75	28	35	54	293	125	183	156	89	136	1, 178
South Carolina	0	25	52	37	80	114	160	117	135	221	201	219	299	212	138	156	2, 366
South Dakota	----	----	----	----	----	----	----	----	----	----	0	0	0	2	4	0	6
Texas	----	----	----	----	----	----	----	----	----	----	249	4, 694	1, 735	2, 425	2, 917	3, 110	15, 013
Virginia	0	0	0	11	0	46	344	181	123	186	259	301	434	314	267	447	2, 913
Wyoming [3]	----	----	----	----	----	----	0	0	0	1	0	0	----	----	----	----	1
Total	1	26	52	110	134	255	1, 118	942	850	988	2, 078	7, 470	4, 007	4, 675	4, 750	5, 822	33, 278

[1] Entire State covered 1965–68; selected election districts covered 1970–72; since 1975 entire State covered.

[2] Selected county (counties) until 1975; entire State now covered.

[3] Selected county (counties) covered rather than entire State.

[4] Selected town (towns) covered rather than entire State.

---- Not covered for years indicated.

NUMBER OF CHANGES [1] TO WHICH OBJECTIONS HAVE BEEN INTERPOSED, BY STATE AND YEAR, 1965 TO SEPT. 30, 1980

State	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	Totql
Alabama					10	1	3	9	1	6	16	16	1	3	1	2	69
Alaska																	0
Arizona									1		2	2				3	8
California												3	2				5
Colorado																	0
Connecticut																	0
Florida																	0
Georgia				6			12	18	15	22	84	12	34	8	5	10	226
Hawaii																	0
Idaho																	0
Lousiana					2		36	13	6	10	5	52	1	3		8	136
Maine																	0
Massachusetts																	0
Michigan																	0
Mississippi					4	1	20	4	7	2	16	7	8	2	3	3	77
New Hampshire																	0
New Mexico																	0
New York										4	1						5
Oklahoma																	0
North Carolina							10				8		37	3	1	3	62
South Carolina								7	7	30	1	11	8	7	5		76
South Dakota														1	1		2
Texas											1	48	13	22	26	15	125
Virginia						1	6	1		3	1				1		13
Wyoming																	0
Total	0	0	0	6	16	3	87	52	37	77	135	151	104	49	43	44	804

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[1] Some submissions include more than 1 change affecting voting. Thus, the number of changes to which objections have been interposed exceeds the number of submissions which have resulted in objections.

Republican
Study
Committee

RSC

Chairman
REP. RICHARD T. SCHULZE

Executive Director
RICHARD B. DINGMAN

BACKGROUNDER

THE VOTING RIGHTS ACT

Executive Summary

The Voting Rights Act of 1965 is viewed by many to be the most effective Civil Rights measure ever enacted. Major provisions of the Act are permanent and apply nationwide. These provisions ban the use of literacy tests, prohibit poll taxes, provide voter protection under the 15th Amendment, and authorize judicial relief for victims of voter discrimination.

Controversy arises concerning the temporary provisions of the Act (Secs. 4 and 5). These sections establish and mandate federal administrative preclearance for certain States and jurisdictions in an effort to reduce discrimination. There are four different formulas which automatically bring jurisdictions under preclearance requirements (see appendix I). Once covered, jurisdictions must submit any changes in their electoral process to the federal government for approval. Nine States and parts of fourteen others are subject to preclearance. (See Appendix III for list.)

Portions of Sec. 4 expire on August 6, 1982, at which time, six southern States, and parts of three others, would have the opportunity to become exempt from preclearance requirements. These jurisdictions have been subject to preclearance since 1965, and contend they have been singled out by the Federal government long enough.

Proponents of Sections 4 and 5 support extending preclearance requirements for all jurisdictions presently covered to August 6, 1992. They also want to apply an 'effects test' nationwide to existing electoral systems. Many conservatives believe that this approach would continue unfair practices of the federal government that treat States differently in respect to their election laws.

President Reagan has asked the Attorney General to submit a report on the effectiveness of the Voting Rights Act by October 1, 1981. The House Judiciary Committee expects to report a measure prior to the August recess. The Senate does not expect to address the issue until next year.

Background

The Fifteenth Amendment to the Constitution, ratified in 1870, states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation." Since ratification Congress has enacted several measures dealing with protection of our electoral process.

This material was prepared at the request of a member of the Republican Study Committee. The views contained in it should not be construed as being the views of the Republican Study Committee, its officers or its members.
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Two measures were passed in 1870 and 1871 designed to protect voting rights under the 15th Amendment, but were largely repealed at a later date. It would not be until 1957, when Congress began addressing the issue of civil rights, before we would witness enactment of laws that broadened the federal government's authority to challenge discriminatory election laws and procedures.

The Civil Rights Act of 1957, 1960, and 1964 brought new protection of voting rights to citizens in Federal elections. The Act of 1957 authorized the United States to sue anyone who violated the voting rights of another. The Act of 1960 authorized federal courts to appoint voting referees who could help register black voters. The Act of 1964 was aimed at preventing the discriminatory manipulation of literacy tests and provided that blacks were to be registered under the same standards as whites. The 24th Amendment, ratified in 1964, abolished the use of the poll tax in federal elections.

Enactment of the Voting Rights Act of 1965

Between 1957 - 1964 there was little change in black voter registration, and litigation under the Civil Rights Act was moving slowly. In early 1965, Reverend Martin Luther King began a march from Selma, Alabama to Montgomery in support of stronger voting rights for blacks. The marchers were attacked by state troopers, and television accounts of the incident brought strong public reaction sympathetic to Mr. King's cause. On March 15, President Johnson addressed Congress calling for immediate action on legislation to enforce the Fifteenth Amendment.

The result was the enactment of the Voting Rights Act of 1965. The Act was "to assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color...in any Federal, State, or local election." Congress had now moved beyond Federal elections and enacted legislation affecting all elections.

Under the Act, recourse was available to challenge individual State laws in regard to voters' rights. The Act authorized the Justice Department to guarantee voting rights through the administrative process rather than the judiciary. Thus the Act shifted the burden of proof from those who challenge the validity of State laws to the States who must now prove to the satisfaction of agencies of the Federal Government that their election laws are valid.

States, or parts thereof, which had a literacy test or device as a condition of registration on November 1, 1964, and had less than 50% voter registration or voter turnout in the 1964 Presidential election were covered under the Act. (If a jurisdiction could prove that any device or test was not used to deny the right to vote based on race, coverage could be exempted). As a result six southern states and parts of three others were covered under the Act. (See Appendix III) These jurisdictions must 'preclear' any voting law change with the Department of Justice. The Act also authorized the Attorney General to appoint Federal examiners and send Federal election observers to jurisdictions where allegations of discrimination have been made.

Extension of the Voting Rights Act

The Voting Rights Act was extended, with amendments, in 1970 and 1975. Though statistics supported significant increases in the registration of black voters, supporters felt that the Act was needed since there was evidence of subtle discrimination such as intimidation of minority voters at polls, unfavorable places or times of registration, discriminatory location of polls, etc. There was also fear of States reinstituting discriminatory literacy tests.

In 1975, Congress expanded the Act to include language minority voters--Asian Americans, American Indians, Alaskan Natives, and those of Spanish heritage. The Civil Rights Commission reported there was sufficient evidence to establish that non-English speaking citizens were being discriminated in the electoral process. Unlike racial minority coverage which is based on the Fifteenth Amendment, the inclusion of language minorities is based on the Fourteenth Amendment affording due process and equal protection for all.

The Act, as amended, placed a permanent ban on the use of literacy tests and devices. It also prohibited poll taxes and other tests which had been used to deny minorities their right to vote. The use of minority languages, other than English, was required for registration and voting in covered jurisdictions. Residency requirements were abolished for voting for President as long as the voter registers at least thirty days prior to the election, and the Act further required all States to permit absentee registration and voting for Presidential elections.

Supreme Court Interpretation

South Carolina v. Katzenback, 383 U.S. 301 (1966)

This landmark decision established the constitutionality of the Act. The Court found the Act constitutional as a reasonable implementation of the 15th Amendment. Speaking in dissent, Justice Black noted: "A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country. I cannot agree to any constitutional interpretation that leads inevitably to such a result."

Allen v. State Board of Elections, 393 U.S. 544 (1969)

The Court focused on the preclearance section of the Voting Rights Act, and ruled the law covers any State enactment which alters the election law of a covered State in even a minor way. After Allen the number of submissions by covered States to the Federal government increased significantly.
(If a jurisdiction could prove that any device or test was not used to deny the right to vote based on race, coverage could be exempted). As a result six southern states and parts of three others were covered under the Act. (See Appendix III) These jurisdictions must 'preclear' any voting law change with the Department of Justice. The Act also authorized the Attorney General to appoint Federal examiners and send Federal election observers to jurisdictions where allegations of discrimination have been made.

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City of Mobile, Alabama v. Bolden, U.S. (1980)

The Court found that Section 2 of the Act represented no more than a restatement of the Fifteenth Amendment and a discriminatory effect of an election law was not enough to prove unconstitutionality. Blacks in Mobile had challenged the city's at-large system of electing commissioners because no black had ever been elected commissioner although the city was 35% black. Speaking for the Court, Justice Stewart noted that blacks could register and vote without hindrance in Mobile and the 15th Amendment promises no more. He noted further that the Act does not entail the right to have Negro candidates elected.

Issue Definition

The central issue is what federal regulation, if any, is needed to prevent discrimination against minority voters. Should we continue to enact a law that treats States differently, or should we develop an Act that treats all States equally? Both sides agree there should be permanent legislation designed to ensure the right to vote for all citizens.

Controversy will arise on whether or not administrative preclearance, as prescribed by the Voting Rights Act, should continue. Administrative preclearance of State laws (Sec. 5) applied to only certain States (Sec. 4) is probably - the most radical provision of law ever enacted. Not only does it represent onerous federal infringement upon State rights, but also reverses the basic judicial principle of being innocent until proven guilty.

Times have changed from 1965, and legislative mandated preclearance is apparently no longer needed. The concept behind the Voting Rights Act is a citizens' right to vote. A recent CRS study concluded, "That apart from two counties, black citizens in the Southern States have not encountered significant difficulty in registering to vote during the past 5 years." In fact, the majority of testimony heard thus far expresses the concern that minorities are not being elected to office rather than difficulties in the opportunity to vote. No law will make people register, and no law will make people vote.

Conservative Concerns

1. The preclearance provision of Section 5 has taken from certain States their constitutional right to establish voter qualifications. Article I, Section 2 provides the States the qualifications requisite for the election of Members of the House, and the 17th Amendment includes the same provision with regard to voters in elections for Senators. Preclearance also has deprived certain States their constitutional right to regulate presidential elections. Article II, Section 1 declares that every State shall appoint presidential electors in such manner as the Legislature thereof may direct. Although the Supreme Court has upheld the constitutionality of the Act, these provisions of the Constitution dictate that such requirements of Federal law should remain in effect no longer than necessary to eradicate discrimination.

2. States and jurisdictions covered by Sections 4 and 5 are not granted the same privileges and rights as are other States. Their statutes are not accorded the same presumption that statutes of other States are accorded. This treatment basically denies covered States of equal protection under our laws. Denial of voting rights can occur anywhere and the experience of covered States concerning minority voter registration justifies they be treated the same as the rest of the country.

3. Sections 4 and 5 are temporary provisions of the Act, not permanent. (See Appendix II) They have served their purpose and been extended long enough. Yet, if proponents of extension have their way, all jurisdictions, currently covered would be tied to preclearance until August 6, 1992. These jurisdictions are in a Catch-22 situation which has made it impossible for them to extricate themselves from coverage, regardless of what they do, because discrimination will always be inferred.

Covered jurisdictions must be granted the opportunity to be removed from the shackles of presumed guilt. With the expiration of the temporary provisions of the Act, a permanent Voting Rights Act, one that applies nationwide, would remain. It would provide assurance under our laws of freedom from voting discrimination and would provide the basic right of State governments to govern themselves as provided in our Constitution.

4. Expiration of provisions of Section 4 will not leave an aggrieved person without relief from voter discrimination. Section 2 provides protection under the 15th Amendment and Section 3(c) authorizes the court, in any case, to order preclearance as a remedy if the court finds 14th or 15th Amendment voting violations.

5. No one questions the fact that minority voter registration, especially in the South, has increased significantly since 1965. For 1980, black voter registration in the south was 56.8% as compared to only 29.3% in 1965. White voter registration in the South of 69.9% in 1980. Some of this difference can be attributed to differences in age, education, and income distributions of black and white populations. The main form of voter discrimination regarding registration had been the use of literacy tests. Such practice is now permanently banned.

6. Through 1980 the Department of Justice has reviewed 34,798 voting law changes submitted under Section 5. Only 815 objections have been rendered by the Department, or only 2.3%. In determining the need for extended coverage, especially for the South, the rate of change in objections by the Department is important. Between 1965 and 1974, the Department objected to 6.2% of changes submitted by covered jurisdictions in the South and elsewhere. From 1975 to 1980, the Justice Department objected to only 1.8% of the changes submitted by all jurisdictions. This clearly shows that the number of changes viewed as potentially discriminatory has significantly dropped. For the South the figures are 6.5% for 1965 - 74, and 3.6% for 1975 - 80, a 45% decrease.

Yet, it is this small number of objections that are providing the ammunition for the proponents of extension. If there were no recourse available for alleged victims of discrimination except the temporary provision of the Act, then extension would be justified. However, under Section 3(c) of the Act, the Attorney General can prescribe preclearance as remedy to discrimination. Many conservatives believe now is the time to bring covered jurisdictions out from under the onerous provisions of Sections 4 and 5.

7. Most prominent in debate and media coverage are instances where the number of minorities elected to office does not approximate the minority proportion of the population. Constitutional and legislative concerns have been designed to protect our citizens' right to vote. The right to vote does not mean the right to be elected! Democracy is based on the rights of individuals, not groups. The logical conclusion concerning proportional representation in regard to the Voting Rights Act would be to establish a quota system concerning the election of minorities to office. Any quota system for elected officials will destroy a democratic government.

In fact, the southern States covered under the Act have done quite well in electing minorities to office. Georgia has the highest percentage of black State legislators of all the States. Four other States are among those with the largest numbers of black State legislators: Alabama with 15, Louisiana with 12, Mississippi and South Carolina with 14. North Carolina has 15. Figures are not yet available for the 1980 election, but as of July 31, 1981, two of the covered States are among the four States with the largest number of black elected officials at all levels: Mississippi with 387 and Louisiana with 363.

8. Sections 4 and 5 have placed cumbersome burdens on many States and jurisdictions. If covered, they must submit any and all changes to the Department of Justice. This can range from major changes such as annexation or redistricting to minor changes such as moving a registration place from one room to another room across the hall!

What has happened as a result of this? Some jurisdictions simply have not instituted any changes that could be beneficial to minorities simply because they would have to submit the change to Washington for approval.

In Richmond, Virginia, a city council election was held up for 5 years because the Justice Department objected to their at-large election that followed a recent annexation. The Department felt it diluted minority voters and ordered the city to go to a ward system. At the same time the Department had approved an at-large election for Richmond in the election members to their General Assembly.

In Alabama, a city wished to change from a commission form of government to an aldermanic system. This would have increased the opportunity for the election of blacks to the city commission. Yet, it took 1 year to receive approval from Washington.

In Suffolk, Virginia, the city wished to move a polling place a quarter of mile away in order to save costs. The Justice Department objected. Elected officials of the city had to travel to Washington to plead their case, and finally the Department approved the change.

Related Issues

Section 2 (permanent)

This provision basically reasserts the 15th amendment in law. This protects voters from a jurisdiction enacting a voting law with an *intent* to discriminate. The provision was upheld by the Supreme Court in *Mobile* v. *Bolden*. That decision, however, has come under attack from civil rights activists since protection under section 2 does not cover any law that may have the *effect* of discrimination.

Amendments will be offered to amend Section 2 to provide protection from the *effects* of any voting law in addition to any *intent* to discriminate. The basis of support of the amendment is that there are several jurisdictions with a substantial percentage of black population that do not have, or never had, blacks holding elective office. The Voting Rights Act is designed to protect the right to vote -- not assure the election of minorities.

Many conservatives believe amendments to Section 2 should be defeated.

The Hyde 'Bail-Out' Measure (H.R. 3948)

Congressman Henry Hyde has introduced a measure designed to provide an opportunity for covered jurisdictions to exempt themselves from coverage. Hyde's proposal will become the critical issue *if* administrative preclearance is extended. Currently, once a jurisdiction is covered under the Act there is little or no recourse available to become exempt from coverage. A statute becomes overbroad when it penalizes those persons who do not deserve to be penalized as well as those who do.

Hyde's bill would allow jurisdictions to be exempted from further preclearance requirement if 1) they could show that they had not used a test or device for the past 10 years to discriminate against minorities, 2) they had submitted all required changes to the Department of Justice, 3) that the Justice Department had not objected to any submission of the jurisdiction, and 4) the jurisdiction had passed laws that were designed to enhance minority participation in the electoral process. Hyde's bill would also amend Section 2 so that action could be taken if any prospective election law was intended or *had the effect* of minority discrimination.

Jurisdictions must be given the opportunity to become exempt from mandated preclearance. If not through expiration of certain provisions of current law, then through adoption of Hyde's proposal. There are concerns among conservatives, however, over the fourth eligibility requirement of H.R. 3948.

A main concern of the requirement is that discrimination is still inferred for covered jurisdictions. What about communities that happen to lie in a covered State, but have never had the problem of minority voter discrimination? Must they pass a law to show *enhancement* of minority participation in the electoral process? What about communities that pass laws which, in effect, enhance the participation of minorities but are still charged with discrimination? The concern here is *how far* must a jurisdiction improve its electoral process to show minority participation? Some may charge that a jurisdiction should never be exempt from coverage until a certain percentage of minorities are elected to office.

The intent of the Voting Rights Act is to ensure one's right to vote. Many conservatives feel that the fourth requirement should be dropped.

Language Minorities

In 1975, the Voting Rights Act was extended to include language minorities. The constitutional basis for this move was the Fourteenth Amendment under its equal protection provisions. Additional problems have arisen since the inclusion of language minorities, and opponents are asking that those provisions be dropped from the Act.

Certain jurisdictions are subject to t preclearance under the language minorites provisions of the Act (see Appendix I). Jurisdictions will not have an opportunity to become exempt from the Act until August 6, 1985. Proponents of preclearance are asking that coverage under the Act be extended until August 6, 1992.

The minority language provisions require covered jurisdictions to conduct elections in one or more languages in addition to English. Unique problems have arisen under these provisions. In Alaska, for example, anywhere from 2 to 5 ballots versions have been printed and in some languages, native to Alaska, there is no word for "Vote" and "ballot."

Additional costs to States have been high. The bilingual requirements of the Act cost California $2 million in 1978. In 1976 and 1978 the City of San Francisco spent an extra $100,000 and, as a result, a committee of the City's Board of Supervisors has urged Congress to remove these costly and unnecessary requirements. The general arguments against preclearance apply here as well, and the general conservative view is that provisions concerning language minorities should be dropped.

Conclusion

The 97th Congress is faced with developing a Voting Rights Act that is fair, ensures one's right to vote, and provides protection for that right. Both sides agree there is need for permanent law designed to achieve these goals.

There are now 110 years of voting rights legislation on the books. Over this time we have seen the Federal government steadily increase its infringement upon States rights in an effort to remedy voter discrimination. Congress, through judicial construction of our Constitution, has found the means to undermine the rights of our States to self-government. Our Founding Fathers attempted to limit federal intrusion into the power of State governments in the 10th Amendment to the Constitution--"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Regarding the right to vote, we have an opportunity to return to the States their guaranteed right of self-government. Preclearance has served its purpose and the continuation of these temporary sanctions can not be justified. With the expiration of the temporary provisions, a permanent law, with judicial relief, would remain -- one that applies equally nationwide. The rights of all citizens will be protected with the courts available for recourse for anyone who feels his or her right to vote has been abridged.

The true issue is how we should ensure and protect one's right to vote. Should this be done with judicial remedies or with administrative preclearance. Supreme Court Justice Lewis F. Powell in a recent opinion stated:

> "The right freely to vote must be safeguarded vigilantly. If a State law denies or impairs this right, in violation of the Constitution or a valid federal law, the courts are the proper and traditional forum for redress.

* * * * * * * * * * * * *

David Hill
July 10, 1981

APPENDIX

I. Formulas used to determine coverage with Voting Rights Act.

Racial Minorities

- The jurisdiction, on November 1, 1964, maintained a 'test or device' as a condition for registering to vote, and less than 50% of its total voting age population participated in the 1964 Presidential election (Section 4(b))

- The jurisdiction, on November 1, 1968, maintained a 'test or device' as a condition for registering or voting, and less than 50% of the total voting age population participated in the 1968 Presidential election (Section 4(b))

Language Minorities

- More than 5% of the citizens of voting age in a jurisdiction were members of a single-language minority group as of November 1, 1972, and the jurisdiction provided registration and election materials in English only as of November 1, 1972, and less than 50% of the citizens of voting age participated in the 1972 Presidential election (Section 4(f) (3))
- More than 5% of the citizens of voting age in the jurisdiction are presently members of a single-language minority group, and the illiteracy rate of such persons as a group is higher than the national average (Section 203(b))

II. Duration of special coverage.

Year In Which Jurisdiction Was Covered	Duration of Coverage	Date of Eligibility For Removal
1965 (through determinations made with respect to 1964 election)	17 years	August 6, 1982
1970 (through determinations made with respect to 1968 election)	17 years	August 6, 1987
1975 (through determinations made with respect to 1972 election)	10 years	August 6, 1985
1975 (under Section 203)	10 years	August 6, 1985

III. Jurisdictions where preclearance is required.

Statewide

*Alabama
Alaska
Arizona
*Georgia
*Louisiana
*Mississippi
*South Carolina
Texas
*Virginia

Portions of State

California
Colorado
Connecticut
Florida
*Hawaii
Idaho
Maine
Massachusetts
Michigan
New Hampshire
New York
*North Carolina
South Dakota
Wyoming

* Jurisdiction able to seek removal from coverage if certain provisions of Section 4 are allowed to expire (+ 3 counties in Arizona)

FACT SHEET

RICHARD T. SCHULZE
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Executive Director

EXTENSION OF THE VOTING RIGHTS ACT OF 1965 -- H.R. 3112

SCOPE: This paper presents arguments, pro and con, on expected amendments to H.R. 3112, the extension of the Voting Rights Act of 1965.

Introduction

The House is expected to begin date on renewal of the Voting Rights Act on Tuesday, September 29, 1981. The Act itself is viewed by many to be the most effective Civil Rights measure ever enacted. H.R. 3112 will be the most important civil rights bill before the 97th Congress.

The issues to be debated are highly sensitive, since the Act effectively treats States differently, dependent on any history of voter discrimination that a state might have. The Act was last amended in 1975. As reported by the House Judiciary Committee, H.R. 3112 does the following:

1) Extends special coverage and preclearance provisions for a period of ten years;

2) Permits jurisdictions to meet a new standard of exemption from the preclearance provisions;

3) Clarifies the standard of proof in Section 2 voting discrimination cases; and;

4) Extends the language minority provisions for seven years.

(For a full discussion of the history of the Voting Rights Act and a more complete explanation of the issues please refer to RSC Backgrounder II-95).

Issues

Special Coverage and Preclearance

Section 4 of the Voting Rights Act includes certain trigger mechanisms devised to identify jurisdictions which Congress feels have historically discriminated against black voters. The section has been amended to include language minorities. Those jurisdictions brought under the coverage by Section 4 are required to 'pre-clear' any and all electoral changes that they might adopt as defined in Section 5 of the Act.

Currently, once a jurisdiction is covered by Section 5 there is little or no recourse available to become exempt from preclearance coverage. For some states, 'pre-clearance' coverage has been required since 1965. Many feel that the requirements of Section 5 have become overbroad since they may be penalizing jurisdictions who do not deserve to be penalized, as well as those who do. As a result, incentives for jurisdictions to improve voting conditions have been absent in law. Proposed changes to Section 4 to permit covered jurisdictions meet a new standard of exemption from Section 5 are attempts to improve our laws protecting the rights of voters.

Provisions of H.R. 3112

Covered jurisdictions would be eligible to file bail-out requests in the District of Columbia District Court after August 6, 1984. The jurisdiction would be required to show that, on behalf of itself and its political subdivisions, during the past 10 years, and during the time the bail-out suit is pending:

1) It had not used a "test of device" (This would be met by all jurisdictions covered in 1965 and 1970; jurisdictions covered in 1975 could not file until 1985.)

2) It had not been found by a court to have abridged the right to vote, or was a party to a consent decree or settlement agreement which resulted in the abandon-of a discriminatory voting practice.

3) It was not the subject of a pending voting discrimination lawsuit at the time it sought to bail-out.

4) It had fully complied with Section 5 of the Voting Rights Act. All submissions must have been made to DOJ in a timely manner; the jurisdiction must not have implemented changes that were objected to; and election laws which were objected to must have been repealed.

5) It had not made a submission within the previous 10 years that the Attorney General or the D.C. District Court had objected to.

6) It has eliminated discriminatory voting procedures and methods of election.

7) It has engaged in constructive efforts to eliminate intimidation and harassment.

8) It has engaged in constructive efforts to increase opportunities for convenient registration and voting and for the appointment of minority election officials.

9) No examiners have been sent to the jurisdiction.

Arguments For

-- Will provide the necessary incentives for jurisdictions to make changes in existing practices and methods of election, thereby eliminating all discriminatory practices.

-- Counties within fully covered states will be allowed to file for bail-out independently from the state.

-- While a covered jurisdiction must present a compelling record to show that it has met qualifying standards, the changes are reasonable and will permit jurisdictions with a genuine record of nondiscrimination to achieve exemption.

Arguments Against

-- Bailout would be unavailable if an action alleging a denial or abridgment of the right to vote is pending. This means that a simple filing fee could deny bailout to an otherwise deserving jurisdiction.

-- Since every jurisdiction in a covered state must be granted bailout before the state can achieve bailout, it could take only one county of a covered state to prevent the state from becoming exempt. In some cases, a deserving state could be denied exemption as a result of a county that the state may have little or no control over.

-- Broadens the definition of final judgment to include settlement or consent decrees as a bar to achieving bailout which would encourage litigation rather than favor settlement.

Proposal of Congressman Henry Hyde

Covered jurisdictions would be eligible to file bail-out in the appropriate federal district court, before a three-judge panel, after August 6, 1982, by showing:

1) no test or device had been used in a discriminatory manner for the previous ten years;

2) the preclearance requirements of Section 5 had fully been obeyed for the previous ten years;

3) The Department of Justice had not made any substantial objection to any proposed electoral change submitted during the previous ten years and;

4) The jurisdiction has made constructive efforts to alter practices and procedures in effect which constitute barriers to minority voter participation, as well as eradicate voter harrassment and intimidation.

Arguments For

-- Provides the necessary and reasonable incentives for covered jurisdictions to advance the voting rights of minority citizens.

-- Would allow a covered state, that is declared to be nondiscriminatory to become exempt, even though the state might have one county, within its boundary, that does not meet the bail-out requirements.

-- Provides meaningful reform to the Act by allowing deserving jurisdictions to become exempt from preclearance coverage and, at the same time, retains administrative enforcement of Section 5.

Arguments Against

-- There is a need for consistent and uniform application of any revised bail-out standards. Exclusive jurisdiction over bail-out suits should be maintained in the District Court for the District of Columbia.

-- No state that is covered should become exempt until all its counties have become exempt.

-- There is an absence of an objective measurement of the success of the efforts to increase minority participation.

Language Minorities

In 1975, the Act was extended to include language minorities. The constitutional basis for this move was the Fourteenth Amendment under its equal protection provisions. Certain jurisdictions are subject to preclearance under the language minorities provisions of the Act as defined in Section 4. Jurisdictions subject to preclearance under the language minority provisions presently are not able to seek exemption until August 6, 1985.

Section 203(c) of the Act defines the language minority bilingual ballot provisions that mandate the printing of bilingual ballots.

Arguments For

-- English-only elections in areas with substantial non-English speaking citizens constitute a test or device to keep citizens from voting.

-- Language minority citizens have encountered barriers to achieving full political participation that have resulted in low registration and voting by language minority citizens.

-- Without preclearance requirements on certain jurisdictions in this area language minorities would continue to face voting discrimination.

Arguments Against

-- The Constitutional basis of the Fourteenth Amendment is questionable for the extraordinary federal mandates of preclearance upon states, or parts thereof. The historical discrimination that blacks had faced through history, have been more severe and direct than what has been alleged to be faced by language minorities.

-- The provisions place undue and unachievable burdens upon the states. In some cases, 2 to 5 ballots have been required to be printed, with some languages having no words for 'vote' and 'ballot'.

-- The provisions have placed unecessary and costly requirement on covered states and various jurisdictions.

Section 2 Amendments

The Supreme Court ruled in Mobile v. Bolden that Section 2 of the Voting Rights Act simply reasserts the 15th Amendment in law. The court held that a challenged practice would not be unlawful under that section unless motivated by discriminatory intent. Proponents of amendment Section 2 are attempting to make clear that proof of discriminatory purpose or intent is not required in cases brought under Section 2. They profess that discrimination can be found in violation of the Act by showing the discriminatory effect of various electoral practices.

Arguments For

-- Intent is practically impossible to prove in many cases involving electoral practices.

-- The change would help define the conditions where discrimination could occur under the Fifteenth Amendment.

-- Clarify the law in a manner that would state that proof of discriminatory intent is not required in cases brought under Section 2.

Arguments Against

-- Effects or results do not necessarily demonstrate discriminatory actions.

-- There is a concern that such an amendment could ultimately end with a right of proportional representation.

-- The change could require all state and local governments adopt only those electoral changes that would statistically maximize the voting impact of minority citizens.

* * * * * * * *

David A. Hill
September 25, 1981

FIDDLING WITH THE CONSTITUTION WHILE *ROME* BURNS: THE CASE AGAINST THE VOTING RIGHTS ACT OF 1965

*Dr. James McClellan**

Like other small municipalities in the mountainous regions of north Georgia, where the Blue Ridge and the Appalachian Trail mark their timeless entry into the southern Piedmont, the City of Rome is a predominantly white community. Flanked to the north by "Mountain Republicans," Rome shares a common heritage with the rural areas of east Tennessee, northeastern Alabama, the western Carolinas, and southwestern Virginia that dates back to the War Between the States. In these areas, union sentiment ran the highest in the old Confederacy, frustrating the secessionists and even the war effort. Long before the war, the small upland farmers who populated this region were a class apart from the lowland planters. They had neither slaves nor plantations, and their politics traditionally have reflected different interests and attitudes. Even today one senses an attachment to the ancient Republican traditions. "They vote a straight Republican ticket election after election. Nor are the mountaineers Republicans by choice; they are Republicans by inheritance."[1]

Because the Negro population of this area has never been substantial in number, the tiny hamlets and small towns dotting the southern tip of the Blue Ridge historically have conducted their political affairs in an atmosphere that is relatively free of racial strife compared to the southern parts of the state, where the Negro population of Georgia is concentrated. Many of the thinly populated counties of north Georgia, for example, contain almost no Negroes. According to the 1980 Census, Forsythe County contains only one Negro; Fannin County has only seven; Gilmer, just twenty-two. Dawson County has none. Throughout the region, Negroes represent a miniscule fraction of the total population.[2]

Rome, located in Floyd County on the fringe of the Mountain Republican area, contains a percentage of Negroes slightly larger than most of the counties to the north, but is otherwise representative of the area in that whites comprise the great bulk of the population.[3]

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[1] V. KEY, SOUTHERN POLITICS 280-81 (1949).

[2] UNITED STATES BUREAU OF THE CENSUS, POPULATION & HOUSING, FINAL P & H UNIT Count, Series PHC 80-V (1980).

Thus situated, the City of Rome has experienced fewer racial problems than most small cities of the Deep South. Though it did not elude entirely the whirlwinds of Reconstruction politics,[4] Rome seldom felt a conspicuous federal presence in its local affairs. And when the initial flurry of federal laws generated by the civil rights movement of the late 1950's and early 1960's fell on Georgia, Rome was more of an observer than an intended recipient. While other Georgia cities to the south, such as Albany and Atlanta, were embroiled in civil disturbances, Rome was seemingly untouched by racial discord. Enjoying considerable local autonomy, Rome quietly built a record of success in race relations beginning in the 1960's largely on its own initiative.[5] But with the passage of the Voting Rights Act of 1965,[6] Rome soon found itself caught up in the broad sweep of federal electoral reform. Not since 1867, when General John Pope established a military outpost in Rome,[7] had the mountain city experienced such direct federal intervention in the conduct of its affairs.

Rome stoutly resisted the application of the Voting Rights Act to its political affairs and eventually brought an action in 1977 against the United States for declaratory relief. Claiming exemption from the statute on the ground that the City's various annexations and voting changes over the course of a decade had neither the purpose nor the effect of denying or abridging the right to vote on the basis of race, Rome argued that Attorney General Griffin Bell had unconstitutionally applied the Act to the city. A three-judge District Court for the District of Columbia rejected this argument, however, holding that although Rome's electoral changes were enacted without discriminatory purpose, they were nevertheless prohibited under the Act because of their discriminatory effect.[8] In *City of Rome v. United States*,[9] the Supreme Court affirmed the District Court ruling. In response to the city's claim that the Voting Rights Act exceeded Congress' enforcement power under the fifteenth amendment, the Court reaffirmed its expansive view of the enforcement power in *South Carolina v. Katzenbach*[10] and went on to write a new chapter in the history of the fifteenth amendment. Under section 2 of the amendment, the Court concluded, Congress' enforcement powers are so broad as to include the right to prohibit practices that in and of themselves do not violate section 1, so long as the prohibitions attacking discrimination are "appropriate."

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[3] In 1970, Rome had a population of 30,759, of whom 23,543, or 76.6% were white and 7,216, or 23.4% were Negro. The voting age population in 1970 was 79.4% white and 20.6% Negro. The actual number of registered voters in Rome closely paralleled these percentages: as of 1975, Rome had 13,097 registered voters, of whom 83.9% were white and 15.5% were Negro. City of Rome v. United States, 472 F. Supp. 221, 223 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980). Justice Marshall's opinion for the Court omits reference to the 1975 population data contained in both the district court's opinion and in Brief for Appellants at 5, City of Rome v. United States, 446 U.S. 156 (1980).

[4] *See* A. CONWAY, THE RECONSTRUCTION OF GEORGIA (1966); The Condition of Affairs in Georgia: Statement of Hon. Nelson Tift to Reconstruction Committee of the House of Representatives, Washington, February 18, 1869 (1971). Although all the southern states had many common experiences under Reconstruction, those on whom it bore the hardest had a large Negro population—South Carolina, Louisiana, and Mississippi in particular.

[5] *See* the district court's findings in 472 F. Supp. at 224-27.

[6] Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1976), *as amended by* Act of June 22, 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970) *and* Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975)).

[7] A. CONWAY, *supra* note 4, at 142.

City of Rome thus represents a bold new course of Constitutional development under the Reconstruction Amendments in that Congress may now reach beyond the substantive provisions of the amendments themselves to prohibit state action which, in Congress' judgment, has an unintended but discriminatory impact. No less significant or novel is the underlying political theory of democratic representation implicit in the Court's decision, suggesting that the fifteenth amendment not only guarantees freedom from racial discrimination in the exercise of the franchise, but also creates a minority right to hold office.

In response to *City of Rome* and the body of case law that has been developed by the Supreme Court under the Voting Rights Act since 1966, this article offers the thesis that the Act itself is an unconstitutional exercise of legislative power under the fifteenth amendment, and that *City of Rome* is contrary to the intentions of those who framed both amendment and the Act. Examining this decision and earlier cases in the light of Congressional hearings and debates on the adoption and extension of the Voting Rights Act, the article contends that the Court has interpreted the Act to include political rights for minorities and restrictions on the states that run counter to the expressed intent of those who participated in the formulation of the Act. An accompanying analysis of the debates on the framing and adoption of the fifteenth amendment further maintains that the framers specifically considered and rejected the position now supported by the Court that literacy tests and the right to hold office fell within the purview of the amendment, it being generally agreed in 1869 that the states retained their power over these aspects of the franchise.

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[8] 472 F. Supp. at 245.

[9] 446 U.S. at 187.

[10] 383 U.S. 301 (1966).

Crucial to a proper interpretation of both the Act and the enforcement clause of the fifteenth amendment are the debates on the Ku Klux Klan Act of 1871, when the framers of the Reconstruction Amendments first attempted to analyze in depth their understanding of Congress' power to enforce these amendments "by appropriate legislation." Though ignored by the Court, these important debates shed considerable light on the intended scope and meaning of the enforcement power. From an analysis of this legislative history, the author concludes that the framers of the Reconstruction Amendments did not intend to confer upon Congress all of the power over political rights that is embodied in the Voting Rights Act of 1965, and expressly favored a construction of the enforcement power that was consistent with the principles of Federalism.

Finally, this article briefly examines the line of cases culminating in *City of Rome* against the backdrop of the American political tradition, and asserts that the Court has imposed upon Georgia and the other states singled out by the Voting Rights Act a theory of democracy that is essentially foreign to the American experience. This article thus challenges the underlying assumption of the Court's ruling that a system of proportional representation, guaranteeing the election of Negro candidates, will necessarily enhance the influence of the black community in local affairs.

I. GENESIS OF THE VOTING RIGHTS ACT OF 1965

Although the Equal Protection Clause frequently has been utilized to protect the right to vote, the fifteenth amendment, declaring that the right to vote shall not be denied or abridged "on account of race, color, or previous condition of servitude," was originally intended to serve as the real workhorse of Negro suffrage.[11] Two months after the amendment was adopted, Congress, exercising its new enforcement powers under section 2,[12] passed the Enforcement Act of 1870.[13] But this measure, which sought to prohibit both state and private action interfering with voting rights, was largely unsuccessful. The Supreme Court struck down provisions of the Act aimed at private action,[14] and Congress in 1894 repealed most of the remaining sections of the statute dealing with official action.[15]

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[11] That the framers of the fourteenth amendment never intended to protect political rights and Negro suffrage under the equal protection clause is convincingly argued by R. BERGER, GOVERNMENT BY JUDICIARY 52-192 (1977).

[12] The thirteenth, fourteenth and fifteenth amendments contain almost identically worded sections empowering Congress to enforce them. Section 2 of both the thirteenth and fifteenth amendments provides that "Congress shall have power to enforce

Congress then withdrew from the field, and for the next sixty years the task of eliminating racial qualifications in the franchise devolved principally on the Supreme Court. In carrying out this responsibility, the Court assiduously thwarted state efforts, whether statutory or administrative, to disenfranchise the Negroes, even reaching out to strike down attempts by political organizations to exclude Negroes from voting in primary elections.[16] Throughout this period, the Court's discussion of Congress' enforcement powers under the fifteenth amendment was necessarily limited to the issue of whether Congress could proscribe private action. The only remedial legislation passed by Congress was the Force Act of 1871, designed to supplement the Enforcement Act of 1870 by providing for the appointment of federal officers to supervise elections of members of the House of Representatives.[17] In *Ex Parte Siebold*[18]

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this article by appropriate legislation." Section 5 of the fourteenth amendment, however, states that "The Congress shall have power to enforce by appropriate legislation, the provisions of this Article." The Court has discerned no difference among the clauses and none was intended. *See* City of Rome v. United States, 446 U.S. at 207-08 n.1 (1980) (Rehnquist, J., dissenting); United States v. Guest, 383 U.S. 745, 783-84 (1966) (Brennan, J., concurring in part, dissenting in part); James v. Bowman, 190 U.S. 127 (1903). Enforcement clauses have been routinely added to constitutional amendments since the adoption of the Reconstruction Amendments. *See* U.S. CONST. amends. XVIII, § 2, XIX, para. 2, XXIII, § 2, XXIV, § 2, XXVI, § 2 (proposed).

[13] Ch. 114, 16 Stat. 140 (1870). As originally introduced by Representative John Bingham of Ohio (author of section 1 of the fourteenth amendment), the Act covered only state action under the fifteenth amendment. Under the sponsorship of Senator John Pool, a Republican from North Carolina, however, the Act was broadened to cover private action and action interfering with rights under both the fourteenth and fifteenth amendments. *See also* the Force Act of 1871, ch. 99, 16 Stat. 433.

[14] James v. Bowman, 190 U.S. 127 (1903). The Court struck down section 5 of the Act on the ground that the fifteenth amendment did not authorize Congress to prohibit private interference with the right to vote.

[15] Ch. 25, 28 Stat. 36 (1894); ch. 15, 35 Stat. 1153 (1909). The surviving statutes of this period are 18 U.S.C. §§ 241-242 (1976) (criminal) and 42 U.S.C. §§ 1971(a), 1983, 1985(3) (1976) (civil). The debates on the enactment and repeal of the Act are collected in I B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 443-543, 803-34 (1970).

[16] *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

[17] Ch. 99, 16 Stat. 433 (1871). In effect, the Act suppressed state electoral processes.

[18] 100 U.S. 371 (1880).

the Supreme Court upheld the Force Act as a proper exercise of Congress' powers under article I, section 4 (the "Times, Places and Manners Clause"), without reaching the question of Congress' enforcement powers under the fifteenth amendment. In 1894, however, this measure was repealed.

The general theory thus adopted concerning Congress' power over the electoral process indicated that Congress could legislate under the fifteenth amendment to protect the suffrage in all elections against state interference based on race, color, or previous condition of servitude,[19] whereas under article I, section 4, Congress could legislate against public or private interference but only in federal elections. Protection against private interference with the right to vote in state elections was therefore thought to be beyond the scope of Congress' powers.

Here matters stood when Congress reasserted its enforcement powers in response to the civil rights movement that erupted in the wake of *Brown v. Board of Education.*[20] The first in a series of remedial statutes designed to assist in federal enforcement of fifteenth amendment rights, the Civil Rights Act of 1957[21] made it unlawful for any person, whether acting as a public official or privately, to interfere with the right to vote in any election for *federal* officers. At the heart of the Act's enforcement mechanism were provisions authorizing the Attorney General to institute civil suits for injunctions in aid of the right to vote in state, territorial, district, municipal, or other territorial subdivision elections, and to seek injunctive relief in the courts against violations of civil rights protected under section 2 of the Ku Klux Klan Act of 1871.[22]

This Act was followed by the Civil Rights Act of 1960, which again increased the powers of the executive branch and strengthened existing procedures by authorizing the Attorney General to obtain a finding, through the courts, of a "pattern or practice" of voter discrimination in any jurisdiction. Upon the entering of such finding, which significantly removed the issue of Negro voting beyond a case-by-case determination, all qualified Negroes would be registered to vote by court-appointed referees.[23]

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[19] James v. Bowman, 190 U.S. 127 (1903); United States v. Reese, 92 U.S. 214 (1876).

[20] 347 U.S. 483 (1954).

[21] Pub. L. No. 85-315, 71 Stat. 634 (1957) (codified in scattered sections of 5, 28 & 42 U.S.C. (1976)).

[22] 42 U.S.C. §§ 1971(b), (c) (1964). Section 2 of the Klan Act is now 42 U.S.C. § 1985 (1976). In addition, the 1957 Act established a "temporary" United States Commission on Civil Rights (subsequently extended on numerous occasions to 1981) to investigate civil rights violations and make recommendations to the President and Congress, and provided for an additional Assistant Attorney General to direct a new Civil Rights Division in the Department of Justice.

Title I of the Civil Rights Act of 1964[24] signaled a new direction in voting rights legislation by restricting the rights of the several states in their determination of voter qualifications. Unlike the earlier statutes, which forbade the discriminatory application of state voter qualification standards, the 1964 Act went beyond the realm of regulation to impose the equivalent of a federal literacy test. The Act not only prohibited the discriminatory administration of literacy tests in federal elections, but also established a "rebuttable presumption" of literacy for any prospective voter who had completed the sixth grade in a school where the English language had served as the basis of instruction.[25]

Finally, in the Voting Rights Act of 1965,[26] Congress exceeded what had previously been regarded as the limit of its authority under the Enforcement Clause of the fifteenth amendment. Grounded in part on section 2 of the fourteenth amendment and article I, section 4 of the Constitution, the Voting Rights Act prohibited not only various forms of state action in the electoral process, but also private acts of voter intimidation in federal, state and local elections.[27] Creating what are admittedly "stringent new remedies for voter discrimination,"[28] the Act established federal supervision over state voter qualification tests and state electoral processes "which in the thoroughness of its control is reminiscent of the Reconstruction era."[29] While strengthening judicial remedies, the Act also provided for direct federal intervention through a variety of complex administrative remedies to remove both immediate and future impediments to minority political participation and representation. Enacted in response to demonstrations in Selma, Alabama protesting discriminatory voting registration practices, the Act was originally conceived as a temporary expedient to end almost a century of racial discrimination in the electoral process.[30] The bill that was submitted to Congress by President Lyndon Johnson on March 17, 1965 provided that the Act should remain in effect for ten years.[31] Congress rejected this proposal in favor of a five-year period; but in 1970 Congress extended coverage of the Act for another five years and in 1975 extended it again for seven.[32] With two important exceptions, most provisions of the Voting Rights Act are scheduled to "expire" in 1982.[33]

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[23] Pub. L. No. 86-449, 74 Stat. 86 (1960) (codified in scattered sections of 18, 20 & 42 U.S.C. (1976)). The 1960 Act also authorized the appointment of federal voting referees and provided safeguards for the protection and inspection of federal election records.

[24] Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified in scattered sections of 5, 28 & 42 U.S.C. (1976)).

[25] 42 U.S.C. § 1971 (a)(C)(c) (1964).

[26] Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1976)).

[27] In its section-by-section analysis of the Act, the House Judiciary Committee commented, in anticipation of a constitutional challenge, that

> [t]he power of Congress to reach intimidation by private individuals in purely local elections derives from Article I, section 4, and the implied power of Congress to protect Federal elections against corrupt influences, neither of which requires a nexus with race. While Article I, section 4 and the implied power of Congress to prevent corruption in elections normally apply only to Federal elections, and section 11 applied to all elections, these powers are *plenary* within their scope, and where intimidation is concerned, it is impractical to separate its pernicious effects between Federal and purely local elections.

H. R. REP. NO. 439, 89th Cong., 1st Sess. 30-31 (1965), *as quoted in* II B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES 1502-03 (1970) (emphasis added). The Supreme Court has not ruled on the constitutionality of section 11 of the Act relating to private actions interfering with voting rights in federal, state and local elections.

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[28] South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

[29] C. Rice, *The Voting Rights Act of 1965: Some Dissenting Observations*, 15 KAN. L. REV. 159, 163 (1966).

[30] The historical setting of the Act is discussed in II CONGRESSIONAL QUARTERLY SERVICE: CONGRESS AND THE NATION 1965-1968 356-64 (1969); *see also* South Carolina v. Katzenbach, 383 U.S. at 308-15 (1966) (discussing Congressional and judicial concern over tactics regularly employed in the South to evade the fifteenth amendment and prevent Negroes from voting). For a discussion of earlier federal efforts to enforce Negro voting rights, see Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523 (1973); Note, *Federal Protection of Negro Voting Rights*, 51 VA. L. REV. 1053 (1965).

[31] Significant portions of the legislative history of the original act are contained in H.R. REP. NO. 439, 89th Cong., 1st Sess. 72 (1965), *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 2437-508 and II B. SCHWARTZ, *supra* note 27, at 1484; S. REP. NO. 162, 89th Cong., 1st Sess. (1965); *Joint Views of 12 Members of the Judiciary Committee Relating to the Voting Rights Act of 1965*, *attached to* S. REP. NO. 162, *supra*, and *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 2540. President Johnson's March 15 address on voting rights to a joint session of Congress one week after the Selma disturbance, and floor debate on the Act, are contained in II B. SCHWARTZ, *supra* note 27, at 1506.

[32] Congressional action on the most recent extension of the Act in 1975 is contained in *Hearings on the Extension of the Voting Rights Act of 1965 Before the Subcommittee on Constitutional Rights of the House Judiciary Committee*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 House Hearings*]; *Hearings on the Extension of the Voting Rights Act of 1965 Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *1975 Senate Hearings*]; S. REP. NO. 94-295, 94th Cong., 1st Sess. (1975), *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 774.

[33] Technically speaking, a covered state would not be automatically exempt

II. PROVISIONS OF THE VOTING RIGHTS ACT OF 1965

A. *General Provisions*

The Act consists of nineteen sections, some of which are permanent legislation of general application throughout the nation. Among the general provisions is section 2, which prohibits the states from using any racially discriminatory "voting qualification or prerequisite to voting, or standard, practice or procedure."[34] Far-reaching and reminiscent of the previously abandoned Force Act of 1871, section 3(a) of the Act authorizes federal courts to replace state election officials by federal examiners, with full power to examine and register voters "whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the guarantees of the fourteenth or fifteenth amendment in any State or political subdivision." If the court finds that any voter qualification test has been used in a discriminatory manner, it may suspend the use of the test indefinitely and prevent the enforcement of any "voting qualification or prerequisite to voting, or standard, practice or procedure" that is different from that in force when the proceeding was commenced, unless the court is satisfied that the procedure in question "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[35] Section 10 of the Act, superseded by *Harper v. Virginia State Board of Elections*,[36] and the twenty-fourth amendment banning the payment of poll taxes as a requirement for voting, contains a Congressional finding that the poll tax violated the fifteenth amendment; and it instructs the Justice Department to bring suit against its application.[37]

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under section 4 even if Congress failed to extend the Act beyond August 6, 1982, as it would still be necessary for the state to bring an action for declaratory judgment. *See* 42 U.S.C. § 1973 b(a) (1976). 42 U.S.C. § 1971 (1976), in which subpart (a)(2)(c) prohibits the use of a literacy test as a condition for voting, is permanent legislation. The bilingual ballot requirements in 42 U.S.C. §§ 1973aa-1a are not scheduled for expiration until August 6, 1985. Senator S. I. Hayakawa and Representative Paul McCloskey, California Republicans, have introduced legislation calling for repeal of the bilingual requirements. See note 272, *infra*. Senator Charles Mathias, a Maryland Republican, and Representative Peter Rodino, a New York Democrat, introduced legislation on April 8, 1981 to extend the Voting Rights Act for ten years to August 6, 1992, and to nullify the effects of *City of Mobile v. Bolden*, 446 U.S. 55 (1980). *See* N.Y. Times, April 8, 1981, at A10, col. 3.

[34] 42 U.S.C. § 1973 (1976). The original act is reprinted as an Appendix to *South Carolina v. Katzenbach*, 383 U.S. at 337-355.

[35] 42 U.S.C. § 1973a(a) (1976).

[36] 383 U.S. 663 (1966).

[37] 42 U.S.C. § 1973h (1976).

Other sections provide civil and criminal penalties for violations of the Act.[38]

B. Special Provisions

1. Sections 6-9: Federal Voting Examiners and Observers

The foundation of the Act rests on its special provisions, sections 4 through 9. These requirements are temporary and apply only to selected states and political subdivisions. Sections 6 through 9 are designed to strengthen earlier federal voting registration programs by authorizing the Attorney General, at his discretion, to use examiners and observers where voting qualification tests have been suspended under section 4 of the Act.[39] Unless overruled by a Federal District Court, the Attorney General may appoint federal examiners to enter a covered jurisdiction and decide who shall be eligible to vote in all federal, state and local elections, if: (1) he has received complaints from twenty or more residents that they have been denied the right to vote on account of race or color, and he believes those complaints to be meritorious; or (2) in his judgment "the appointment of examiners is otherwise necessary to enforce the guarantees of the fourteenth or fifteenth amendment."[40] Examiners are authorized to list individuals who satisfy state voter qualifications and to issue them a certificate evidencing their eligibility to vote.[41] Observers act as poll watchers to make certain that all eligible persons are permitted to vote and ascertain whether their ballots have been accurately counted. The observers are field employees of the Civil Service Commission or other federal agencies. In the period between 1965 and 1974, more than 6,500 observers were sent into the Deep South, almost half of whom were used to cover elections in Mississippi.[42] In general, both examiners and observers have been used sparingly, and most served during the first years when the Act went into effect. In the period between 1965 and 1975, only 60 counties and parishes ever had examiners and only 155,000 of the more than one million new minority registrants in the covered states were registered by this method.[43] The limited use of examiners since 1970 underscores the early success of the Voting Rights Act in getting Negroes registered to vote, and probably the mere threat of examiners has deterred many local registrars from blocking registration.[44]

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[38] 42 U.S.C. §§ 1973i-1973j (1976).

[39] 42 U.S.C. §§ 1973e-1973g (1976).

[40] 42 U.S.C. § 1973d (1976).

[41] 45 C.F.R. § 801.205 (1979).

[42] UNITED STATES COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 35 (1975) [hereinafter cited as VOTING RIGHTS ACT: TEN YEARS AFTER].

[43] *Id.* at 33.

2. *Section 4: Covered Jurisdictions*

Sections 4(a) and 4(b) establish an automatic formula or "triggering" mechanism whereby a state (or one of its local units of government) is prohibited from applying any "test or device"[45] as a qualification for voting in any election if the state or local unit maintained any test or device on November 1, 1964 *and* less than 50 percent of its voting age population was registered to vote or actually voted in the 1964 presidential election. Amendments to the Act have extended the coverage formula of section 4 to include jurisdictions that maintained a test or device on November 1, 1968 or 1972, and had less than a 50 percent turnout in the 1968 or 1972 presidential elections.[46] Direct judicial review of the findings by the Attorney General which trigger the suspension of tests is barred.[47]

Jurisdictions covered in 1965 and early 1966 included Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia, 28 of the 100 counties in North Carolina, 4 of the 14 counties in Arizona, Honolulu County, Hawaii, and Elmore County, Idaho. Since 1965, other jurisdictions have been added and coverage extends also to Texas, certain counties in California, Colorado, Florida, Michigan, New York, South Dakota, and Wyoming, and a number of towns in the New England states of Massachusetts and New Hampshire.[48]

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[44] *Id.* at 34-35.

[45] Section 4(c) of the Act defines a "test or device" as any requirement that a person, as a prerequisite for registration or voting, demonstrate literacy, educational achievement, knowledge, or good moral character, or produce registered voters or other persons to vouch for his qualifications. 42 U.S.C. § 1973b(c) (1976). *See also* 42 U.S.C. § 1973b(f)(3) (1976).

[46] 42 U.S.C. § 1973b(b) (1976).

[47] *Id.* Under § 4(b) of the Act,

> [t]he provisions of subsection (a) shall apply in any state or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November, 1964.
>
> A determination or certification of the Attorney General or of the Director of Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

[48] 45 Fed. Reg. 18898 (1980). For a listing of the various jurisdictions covered from 1965-1975, *see* VOTING RIGHTS ACT: TEN YEARS AFTER, *supra* note 42, at 13-16.

Under section 4(a) of the Act, however, a covered jurisdiction may "bailout" and exempt itself if it can persuade the District Court for the District of Columbia that the jurisdiction has not used a test or device in a discriminatory manner for seventeen (originally five) years preceding the filing of an action for a declaratory judgment.[49] Since 1965, only one state has succeeded in bailing out. In 1966, and again in 1971, Alaska gained exemption, but the 1975 extension of the Act re-established coverage.[50] One other state, Virginia, attempted without success to bailout in 1973.[51] Since 1970, all literacy tests throughout the nation have been suspended under the Act.[52] In addition, section 4(e) of the Act deals with the question of literacy. Unlike most other provisions of the statute, which rest on Congress' power to enforce the fifteenth amendment, section 4(e) was a last-minute floor amendment to the Act based on the Enforcement Clause of the fourteenth amendment. Designed by Senator Jacob Javits (R.-N.Y.) and Robert Kennedy (D.-N.Y.) to emasculate the New York State literacy test and expand the suffrage in New York City, section 4(e) provides that the right to vote cannot be denied to any person because of an inability to read or write English if that person successfully completed the sixth grade in a Puerto Rican school where instruction was given in a language other than English.[53]

3. Section 5: The "Preclearance" Requirement

Once a state or one of its political subdivisions has been subjected to the strictures of section 4 and is prohibited from applying a voter qualification test, it may not thereafter make any changes in its electoral laws unless the executive or judicial branches of the federal government agree beforehand that such changes are nondiscriminatory. Section 5 of the Act stipulates that no state or local government may even enact a new law "or seek to administer any voting qualification or prerequisite to voting [that is] different from that in force or effect on November 1, 1964," without first gaining the approval of the Attorney General or the United States District Court in the District of Columbia.[54] The announced purpose of the section 5 preclearance provision "was to break the cycle of substitution of new discriminatory laws and procedures when old ones were struck down."[55] The more immediate objective of this provision is to give government lawyers in the Voting Section of the Civil Rights Division of the Justice Department direct and continuous administrative supervision over the affected states and their political entities, and to avoid the inconvenience of the judicial process. The provision's obvious effect is to give the federal government a veto over all new electoral laws enacted by the covered jurisdictions, whose pre-existing voter qualification standards have been frozen under section 4 of the Act.

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[49] 42 U.S.C. § 1973b(a) (1976).

[50] Alaska subsequently filed yet another bailout suit but abandoned it. *See* Alaska v. United States, No. 78-0484 (D.C. Cir. May 10, 1979) (stipulated dismissal of the action).

[51] Virginia v. United States, 386 F. Supp. 1319 (D.D.C. 1974), *aff'd mem.*, 420 U.S. 901 (1975).

[52] 42 U.S.C. § 1973aa (1976). Amendments to the Act in 1970 also abolished durational residency requirements for Presidential elections and lowered the voting age to eighteen. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 316, 318. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Supreme Court upheld the amendments, except the proviso lowering the voting age for state and local elections, but this objective was nevertheless achieved by the subsequent adoption of the twenty-sixth amendment.

[53] 42 U.S.C. § 1973b(e) (1976). Writing for the Court, Justice Brennan held in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), that section 4(e) was a valid exercise of the powers granted to Congress by section 5 of the fourteenth amendment, and that the New York English literacy requirement, as applied to disfranchised Puerto Ricans protected by section 4(e), was superseded by virtue of the Supremacy Clause of article VI of the Constitution. The Court declined to rule on the question of whether New York's literacy requirement was constitutional. *See* Cardona v. Power, 384 U.S. 672 (1966).

Until 1971, section 5 was rarely employed to challenge state electoral changes, owing in part to the Justice Department's preoccupation with review of existing statutes and uncertainty as to the scope of section 5's coverage.[56] No less uncertain at the time was the scope of the Attorney General's authority under section 5. Seemingly a delegation of unfettered discretion regarding procedures, standards and administration, section 5 is silent with respect to the procedures the Attorney General must follow in deciding whether to challenge a state submission for an electoral change, what standards govern the contents of these submissions, and what is meant by the sixty-day provision of section 5 in which the Attorney General is to respond to requests for his approval of electoral changes.[57]

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[54] 42 U.S.C. §§ 1973c (1976). Amendments to the Act have extended this restriction to include laws that were in effect in 1968 and 1972.

[55] VOTING RIGHTS ACT: TEN YEARS AFTER, *supra* note 42, at 25.

[56] *Id.* at 25, n.53; MacCoon, *The Enforcement of the Preclearance Requirements of Section 5 of the Voting Rights Act of 1965*, 29 CATH. U.L. REV. 107 (1979); *see also* Perkins v. Matthews, 400 U.S. 379, 393 n.11 (1971).

[57] Section 5 of the Act provides that a newly enacted electoral change may be enforced if it is submitted to the Attorney General and he does not interpose an objection "within sixty days after such submission, or upon good cause shown . . . [n]either an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object . . . shall bar a subsequent action to enjoin en-

Moreover, section 5 does not even authorize the Attorney General to promulgate any regulations. Such regulations were nevertheless issued in 1971, surviving constitutional attack in *Georgia v. United States.*[58] "If these regulations are reasonable and do not conflict with the Voting Rights Act itself," declared Justice Stewart for the Court, "then 5 U.S.C. section 301, which gives to '[t]he head of an Executive Department' the power to 'prescribe regulation for the government of his department' . . . is surely ample legislative authority for the regulations."[59] Reversing the burden of proof, which would ordinarily be carried by the federal government, the Act and accompanying regulations require the submitting jurisdiction to demonstrate to the satisfaction of a three-judge District Court in Washington or the Attorney General that its proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[60] The regulations candidly acknowledge that "section 5 . . . imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia."[61] Should a state or one of its political subdivisions fail to submit a formal request for a change of its electoral laws, both the Attorney General and private parties[62] may bring suit to enjoin enforcement of the law. Following a request for preclearance, the Attorney General has sixty days in which to interpose an objection or allow the change to stand; and the voting practices submitted become fully enforceable if the Attorney General fails to make a timely objection.

The vagueness of this provision, inviting arbitrary discretion, has produced considerable confusion and controversy. Although the

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forcement of such qualification." 42 U.S.C. § 1973c (1976). Does any objection suffice? May the Attorney General simply object to all section 5 submissions? *See* Georgia v. United States, 411 U.S. 526, 542-43 (1973) (White, J., dissenting).

[58] 411 U.S. at 536.

[59] *Id.* The Court cited *United States v. Morehead*, 243 U.S. 607 (1916) and *Smith v. United States*, 170 U.S. 372 (1897) as authority for this proposition. The regulations are contained in 28 C.F.R. pt. 51, §§ 51.1-51.29 (1971); *see also* D. HUNTER, FEDERAL REVIEW OF VOTING CHANGES: HOW TO USE SECTION 5 OF THE VOTING RIGHTS ACT (2d ed. 1975).

[60] 42 U.S.C. § 1973c (1976). As of 1975, the alternative of seeking a declaratory judgment without review by the Attorney General had been used only once. VOTING RIGHTS ACT: TEN YEARS AFTER, *supra* note 42, at 29.

[61] 28 C.F.R. § 51.19 (1971).

[62] *See* Allen v. State Bd. of Elections, 393 U.S. 544 (1966).

Act states that a new state law may be enforced if "the Attorney General has not interposed an objection within 60 days *after such submission*,"[63] *i.e.*, of their filing, the regulations promulgated by the Attorney General provide that no submission is complete until the Attorney General has received all of the information that he deemed essential in making a decision.[64] The Act is silent as to the effect of the sixty-day rule upon requests for reconsideration of an adverse ruling by the Attorney General, but regulations specify that these requests shall also be decided within sixty days of their receipt.[65] Neither the Act nor the regulations explain the application of the sixty-day rule to supplements to requests for reconsideration. In *City of Rome*, however, the Court upheld the Attorney General's interpretation of his regulations on this question and ruled that the sixty-day period commences anew when the submitting jurisdiction supplies additional information on its own accord.[66] "In recognition of the Attorney General's key role in the formulation of the Act," said Justice Brennan in *United States v. Sheffield Board of Commissioners*, "this Court . . . has given great deference to his interpretations of it."[67]

If the Attorney General fails to make an objection, the state may enforce the change; but there is no certainty that the law will remain in effect, for section 5 of the Act contains this qualifier: "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment . . . shall bar a subsequent action to enjoin enforcement of such . . . practice or procedure."[68] Continuous administrative supervision over the states and their local units of government is thus expected under the Act, even if the courts break the cycle and rule against the Attorney General. The broad scope and massive burden of this entire operation is reflected in the statistics compiled in the Justice Department. The 1975 Senate Hearings on the extension on the Act revealed that in the period between 1965 and 1974, the Attorney General's staff processed more than 1,000 requests for voting changes each year.[69] In 1979, a Justice Department official estimated that the Department's staff of eleven section 5 analysts was processing from fifty to seventy-five submissions per week—more than double the number just five years earlier.[70]

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[63] 42 U.S.C. § 1973c (1976) (emphasis added).

[64] 28 C.F.R. §§ 51.3, 51.10(a), 51.18 (1971).

[65] 28 C.F.R. § 51.3(d) (1971).

[66] 446 U.S. at 171.

[67] United States v. Sheffield Bd. of Comm., 435 U.S. 110, 131 (1978).

[68] 42 U.S.C. § 1973c (1976).

[69] *1975 Senate Hearings*, *supra* note 32, at 597; *see also* United States v. Sheffield Bd. of Comm., 435 U.S. at 147 (Stevens, J., dissenting).

These figures reflect a more than startling increase in section 5 litigation.[71] More fundamentally, the figures reveal the radical transformation of the Voting Rights Act that has taken place since 1970.[72] When Justice Department officials, led by Attorney General Nicholas Katzenbach, appeared before Congress in 1965 to explain and defend President Johnson's proposed bill to eliminate discriminatory voting practices, they emphasized the limited scope of the Act. Its purpose, the officials uniformly agreed, was simply to remove the barriers to Negro voter registration. Those barriers, in fact, were the very basis of the Selma demonstrations which prompted the Johnson Administration to draft the bill. Appearing before a subcommittee of the House Judiciary Committee, Assistant Attorney General Burke Marshall, in response to a question by a member of the Committee, flatly stated that, "[t]he problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort, I would like to see it corrected, but that is not what we were trying to deal with in the bill."[73] Before that same body, Attorney General Katzenbach repeatedly emphasized that "the whole bill really is aimed at getting people registered." "Our concern today," he said, "is to enlarge representative government. It is to solicit the consent of all the governed. It is to increase the number of citizens who can vote."[74] Ten years later, testifying as a private citizen before a Senate subcommittee in support of the 1975 extension of the Act, Katzenbach reiterated his understanding of the original intent of the legislation:

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[70] MacCoon, *supra* note 56, at 113 n.45. In addition, the Voting Rights Section of the Civil Rights Division maintains a mailing list of interested parties who receive a weekly listing of current section 5 submissions. This procedure is designed to allow private parties to monitor state and local governmental units for compliance and to assist the Justice Department in enforcement of the Act. *Id.* at 109 n.11. Also strengthening enforcement and encouraging litigation is the 1975 amendment to the Act which permits a court, at its discretion, to award attorney's fee to prevailing parties in voting rights cases. 42 U.S.C. § 1973l(e) (1976). *See* Torres v. Sachs, 538 F.2d 10 (2d Cir. 1976).

[71] In the period between 1965 and 1977, 6,400 electoral change requests were submitted. Approximately 5,800 of these were made from 1971 to 1974. *1975 Senate Hearings*, *supra* note 32, at 597. *See* United States v. Sheffield Bd. of Comm., 435 U.S. at 147 n.8 (1978) (Stevens, J., dissenting).

[72] *See* Thernstrom, *The Odd Evolution of the Voting Rights Act*, 55 PUB. INTEREST 49 (1979).

[73] *Hearings on H.R. 6400 Before Subcommittee No. 5 of the House Committee on the Judiciary*, 89th Cong., 1st Sess. sec. 2, at 74 (1965) [hereinafter cited as *1965 House Hearings*]. *See also* Allen v. State Bd. of Elections, 393 U.S. at 564 (1969).

[74] *1965 House Hearings*, *supra* note 73, at 21. When asked, "[h]ow far down the political scale" the term "political subdivisions" went, Katzenbach replied: "I believe

> The Voting Rights Act was originally designed to eliminate two of the principal means of frustrating the 15th Amendment rights guaranteed to all citizens: the use of onerous, vague, and unfair tests and devices enacted for the purpose of disfranchising blacks; and the discriminatory administration of these and other kinds of registration devices. The Voting Rights Act attempted to eliminate these racial barriers, first by suspending all tests and devices in the covered States, and second, by providing for voter registration in those States by Federal officials where necessary to insure the fair administration of the registration system.[75]

That the Justice Department's understanding of the purpose of the legislation was shared by Members of Congress who participated in the formation of the Voting Rights Act is abundantly evident from a careful reading of Congressional debates and committee hearings and reports. As Joseph Tydings (D.-Md.), a member of the Senate Judiciary Committee stated while leading debate on the Senate floor, the provisions for the suspension of literacy tests and the appointment of federal examiners were "the heart of the bill."[76]

The success of the Act in terms of registration was almost instantaneous, and by 1972 more than one million new Negro voters were registered in the seven southern states covered by the Act.[77] By the early 1970's, however, a new development became evident—the problem of registration, by then essentially solved, had been eclipsed by the preclearance provisions of the Act. Section 5, announced the United States Commission on Civil Rights in 1975, was now "the focus of the Voting Rights Act."[78]

III. *Allen v. State Board of Elections*: THE NEW RIGHT TO POLITICAL OFFICE

The catalyst for this change was not a Congressional alteration of the Act, but the Supreme Court's broad interpretation of the

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that the term 'political subdivision' used in this bill is intended to cover the registration area and that the whole bill really is aimed at getting people registered." *Id.*

[75] *1975 Senate Hearings*, *supra* note 32, at 121.

[76] II B. SCHWARTZ, *supra* note 27, at 1526.

[77] VOTING RIGHTS ACT: TEN YEARS AFTER, *supra* note 42, at 41. Between 1964 and 1972, the number of new black registrants actually increased by 1,148,621, an increase from 29 percent to over 56 percent of the blacks of voting age. *Id.* at 43.

[78] *Id.* at 25.

scope of section 5 in the 1969 case of *Allen v. State Board of Elections*.[79] As Stanley Pottinger, Assistant Attorney General for the Civil Rights Division of the Justice Department, explained:

> The Congressional hearings on the 1970 Amendments to the Voting Rights Act reflect that section 5 was little used prior to 1969 and that the Department of Justice questioned its workability. Not until after the Supreme Court, in litigation brought under section 5 had begun to define the scope of section 5 in . . . [the Allen case] did the Department begin to develop standards and procedures for enforcing section 5.[80]

In *Allen*, the Court, speaking through Chief Justice Warren, held that a state covered by the Act must submit for federal approval not only new laws that might tend to deny Negroes their right to register and vote, but all laws that might also tend to have an adverse effect on the political strength of the Negro community in government. In other words, the *Allen* decision brought about a complete metamorphosis of the Act and the fifteenth amendment, converting the right of the individual into a collective right of the Negro population to an elected representative—in effect a guaranteed right of racial minorities to hold office, whether or not they command majority support.

The *Allen* case involved three Mississippi laws and a routine administrative change in Virginia that had altered election practices without preclearance from the Attorney General. In 1966, the Mississippi legislature amended its election laws to provide that members of county boards of supervisors could be elected at large and that in eleven specified counties the superintendent of schools would henceforth be appointed by the board of education. The third law changed the requirements for independent candidates running in general elections. The Virginia case concerned a bulletin issued by the Board of Elections instructing election judges to aid any illiterate voter who requested help in marking his ballot.[81] Whereas the Mississippi amendments arguably were designed to minimize the political impact of the Negro voter, the record showed that the new Virginia regulation was wholly free of discriminatory purpose. In fact, Virginia election officials had issued the regulation in the belief that existing state voting practices did not conform to the Voting Rights Act.[82]

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[79] 393 U.S. 544 (1969).

[80] *1975 Senate Hearings*, *supra* note 32, at 581.

[81] The appellants were illiterate voters who had attempted to vote for a write-in candidate by sticking labels printed with the candidate's name on the ballot. The voting change was challenged in the district court as instituting a literacy test prohibited under section 4. Not until they argued before the Supreme Court did appellants raise the section 5 issue. 393 U.S. at 553-54.

Without reaching the issue whether these electoral changes were discriminatory, the Court consolidated the four cases and remanded them back to the district courts with instructions to issue injunctions against enforcement of the enactments until the Attorney General had given his approval that the changes met the requirements of section 5.[83] In response to the appellees' argument (based on Congressional hearings) that the scope of section 5 was intended to cover only those changes dealing with voter registration and the right to vote, Chief Justice Warren asserted that "[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered state in even a minor way."[84] This conclusion was warranted, said the Chief Justice, not by the wording of section 5, but by that of section 2, which referred to any "voting qualifications or prerequisite to voting or standard, practice, or procedure."[85] The word "procedure" in this section contained no exceptions, indicating "an intention to give the Act the broadest prossible scope. . . ."[86]

Warren thus presumed that the framers of the Voting Rights Act intended that federal regulation of voting procedures should include not only those procedures relating to registration and voting, but also those affecting voter impact and election results. Drawing from the Court's "vote dilution" rationale in the reapportionment cases developed under the fourteenth amendment, Warren concluded that "[t]he Voting Rights Act was aimed at the subtle, as well as the obvious. . . . [I]t gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.'"[87]

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[82] *Id.* at 552-53.

[83] These suits were instituted by private persons and did not originate in the District Court for the District of Columbia. Although the Act does not provide for a private cause of action, the Court, citing *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), declared that there was an implied right of action because section 5 would be an "empty promise" unless a private individual could seek judicial enforcement of the prohibition. 393 U.S. at 557.

[84] 393 U.S. at 566.

[85] *Id.* at 567 (citing 42 U.S.C. § 1973 (1964 ed., Supp. II)). Section 2 of the Act provided simply that "[n]o voting qualification or prerequisite to voting, or standing, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965) (codified at 42 U.S.C. § 1973 (1965) (amended 1975)). This section was amended in 1975 to include guarantees set forth in 42 U.S.C. § 1973b(f)(2) (1976). *See* 42 U.S.C. § 1971(g) (1976).

[86] 393 U.S. at 566-67. Significant in Warren's opinion was a colloquy between Katzenbach and Senator Hyrom Fong, Republican, Hawaii, in which the Attorney General said that the word "procedure" was "intended to be all-inclusive of any kind of practice." *Id.* at 566.

In the main, Warren's broad interpretation of section 5's coverage thus rested on statutory language rather than legislative history; for the phrase "all action necessary to make a vote effective," seen here as a linchpin of the *Allen* decision, is taken from the Voting Rights Act itself. Significantly, however, this language is drawn from section 14 of the Act, and not the preclearance provisions.[88] This section of the Act, it was generally agreed during the course of Congressional deliberation, was simply declaratory of the fifteenth amendment. Senator Everett Dirksen (R.-Ill.), one of the principal sponsors of the Act, observed at one point that all of the states, including those not covered by section 5, were prohibited from discriminating against Negro voters by section 2. Dirksen described this term as "almost a rephrasing of the fifteenth amendment," not the fourteenth, and Attorney General Katzenbach agreed.[89] Therefore one can reasonably doubt whether the Court's incorporation of section 2 and the fourteenth amendment reapportionment cases into section 5 is consistent with the intent and meaning of the statute or its legislative history.[90]

Such was the basis of Justice Harlan's lengthy dissent in *Allen*, which vigorously assailed the Court's opinion as "an overly broad construction of section 5 of the Voting Rights Act."[91] In the first place, argued Harlan, the Chief Justice had erroneously assumed that section 5 could be severed from the Act and considered independently. "In fact, however, the provision is clearly designed to march in lockstep with section 4."[92] To construe section 5 separately was to lift it out of context in derogation of the obvious reciprocal relationship between the two provisions. Section 4, which suspended all literacy tests and similar "devices" in order to eliminate voter discrimination at the registration stage, necessarily determined the scope of section 5, a backup provision designed to prevent states covered by section 4 from evading its restrictions through the creation of new voter qualification tests.[93] Justice Black had made the same observation earlier in *South Carolina v. Katzenbach*,[94] the point being, as Harlan explained, that section 5 "was not designed to implement new substantive policies, but . . . to assure the effectiveness of the dramatic step that Congress had taken in section 4. The Federal approval procedure found in section 5 only applied to those states whose literacy tests or similar 'devices' have been suspended by section 4."[95] In short, the only purpose of section 5 was "to implement the policies of section 4. . . ."[96] The Court's broad construction of section 5, Harlan concluded, was nothing less than

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[87] *Id.* at 565-66 (citing 42 U.S.C. § 19731(c)(i) (1964 ed., Supp. I)). *See* Reynolds v. Sims, 377 U.S. 533, 555 (1964). *See also* White v. Register, 412 U.S. 755 (1973); Fortson v. Dorsey, 379 U.S. 433 (1965).

[88] Section 14 of the Act, codified in 42 U.S.C. § 19731(c)(1) (1976), defines the terms "vote" and "voting" as follows:

> The terms "vote" and "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, or having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

[89] *See* City of Mobile v. Bolden, 446 U.S. 55, 61 (1980). In the *Mobile* case, the Court ruled that the practice of electing city commissioners at-large (dating back to 1911 and not an electoral change falling within section 5) was not an unfair dilution of Negro voting strength in violation of section 2 of the Voting Rights Act, or of the fourteenth or fifteenth amendments.

[90] When examined in its proper context, the phrase "all action to make a vote effective" hardly supports Warren's proposition, inasmuch as the section refers specifically to qualifications and procedures concerning registration and balloting, and is silent on the question of post-election results. *See* text of 42 U.S.C. § 19731(c)(1) (1976), cited in note 88, *supra*.

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[91] 393 U.S. at 582.

[92] *Id.* at 584.

[93] Justice Harlan offered no legislative history to support his point, apparently believing that it was self-evident. But the legislative record clearly substantiates his claim. For example, Senator Philip Hart, Democrat, Michigan, a prime sponsor of the Act, said that its "two central features" were section 4 and the provisions for federal examiners. "Section 5," he stated, "is supported by much the same evidence as underlies the suspension of tests or devices. This provision is a further appropriate assurance that 15th Amendment rights will not be denied, either by laws currently in force, or by fertile imaginations." II B. SCHWARTZ, *supra* note 27, at 1517, 1521. Senator Joseph Tydings, (D.—Md.) also described the "principal provisions of the bill" as the suspension of tests and the appointment of federal examiners. *Id.* at 1526.

[94] 383 U.S. at 356 ("Section 4(a) to which § 5 is linked, suspends for five years all literacy tests . . . coming within the formula of § 4(b).") (*Id.*).

[95] 393 U.S. at 584. "The statutory scheme contains even more striking characteristics," Harlan continued, "which indicate that § 5's federal review procedure is ancillary to § 4's substantive commands. A state may escape § 5, *even though it has constantly violated this provision*, so long as it has complied with § 4, and has suspended the operation of literacy tests." *Id.* By its very nature, in other words, section 5 monitored only new practices that a section 4(b) jurisdiction sought to implement after the date it was designated. A discriminatory practice in effect before designation could not logically be subject to preclearance. Thus in *Beer v. United States*, 425 U.S. 130 (1976), the Court held that a New Orleans reapportionment plan which continued the use of at-large councilmen seats that had been in existence without change since 1954 could not be tested under section 5. *See* Comment, *Voting Rights—Voting Rights Act of 1965 § 5—Federal Preclearance of Local Election Laws*, 25 N.Y.L. REV. 170-71 (1979).

> a revolutionary innovation in American government that goes far beyond that which was accomplished by section 4. The fourth section of the Act had the profoundly important purpose of permitting the Negro people to gain access to the voting booths of the South once and for all. . . . In moving against 'tests and devices' in section 4. Congress moved only against those techniques that prevented Negroes from voting at all. Congress did not attempt to restructure state governments.[97]

Further, argued Harlan, the Court had improperly read the fourteenth amendment into section 5, mistakenly assuming "that Congress intended to adopt the concept of voting articulated in *Reynolds v. Sims* . . . and protect Negroes against a dilution of their voting power."[98] Harlan's point was well taken. Both the statutory language and the legislative history of the Act, which Harlan cited extensively, revealed that Congress deliberately rejected the construction which the Court was now making.

Congress didn't casually overlook the fourteenth amendment, it "consciously *refused* to base section 5 of the Voting Rights Act on its powers under the Fourteenth Amendment, upon which the reapportionment cases are grounded," asserted Harlan. Indeed, he continued, "[t]he Act's preamble states that it is intended 'to enforce the fifteenth amendment to the Constitution of the United States. . . .'"[99] Thus the relevant case was not *Reynolds v. Sims* but *Gomillion v. Lightfoot*, and section 5 "should properly be read to require federal approval only of those state laws that change either voter qualifications or the manner in which elections are conducted."[100]

That Chief Justice Warren had incorporated section 2 of the Act as well as the fourteenth amendment into the preclearance provisions of section 5 apparently escaped Justice Harlan's attention in the *Allen* decision, and Warren's peculiar reading of the statute concerning the scope of section 5 has gone unchallenged in subsequent cases before the Court. Indeed, Harlan's insightful dissent has been relegated to oblivion, and Warren's claim that section 5 must be given the "broadest possible scope"[101] has become the rallying cry for the continued expansion of federal control over electoral changes in the covered jurisdictions. In an outpouring of decisions since 1969, all resting on the questionable assumptions laid down in *Allen*, the Court has interpreted section 5 to require federal preclearance of laws changing the location of polling places,[102] annexations,[103] and reapportionment and redistricting.[104]

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[96] 393 U.S. at 585.

[97] *Id.*

[98] *Id.* at 588.

[99] *Id.*

[100] *Id.* at 591.

[101] *Id.* at 567.

This line of decisions does not include the Mississippi cases consolidated in *Allen* imposing section 5 on laws adopting at-large systems of election, providing for the appointment of previously elected officials, and regulating candidacy,[105] or the more recent intrusions upon state sovereignty in 1978 sanctioned in the *Sheffield* and *Dougherty* cases. In *United States v. Board of Commissioners of Sheffield, Alabama,*[106] the Court declared that section 5 applied not only to counties and other local units of government that actually register voters, but to any entity within a covered jurisdiction having any power over any aspect of the electoral process. The city of Sheffield, Alabama, which did not even conduct voter registration, contended unsuccessfully that it was exempt from section 5 because the Act, by its own terms, applied only to "states and political subdivisions," and according to section 14(c)(2) a political subdivision was defined as a county or other political entity which conducts voter registration. Writing for the Court, Justice Brennan brushed aside this construction as unduly restrictive. The Act was intended to subject all political entities to preclearance, Brennan insisted, and whether a local unit registered voters was immaterial since "cities can enact measures with the potential to dilute or defeat the voting rights of minority group members. . . ."[107] Similarly, in *Dougherty County, Georgia Board of Education v. White*[108] the Court reaffirmed the *Sheffield* doctrine that any political entity within a covered area under section 4 must obtain the approval of the Attorney General if the political entity adopts any new law impacting upon the electoral process. At issue in *Dougherty* was a rule promulgated by a local school board concerning candidacy qualifications. Finding *Sheffield* dispositive, the Court held that section 5 governed, dismissing the contention that the school board was exempt under the Act because it did not conduct elections.

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[102] *See* Perkins v. Matthews, 400 U.S. 379 (1971).

[103] *See* City of Richmond, Va. v. United States, 422 U.S. 358 (1975); City of Petersburg, Va. v. United States, 410 U.S. 962 (1973), *summarily aff'g* 354 F. Supp. 1021 (D.D.C. 1972).

[104] Beer v. United States, 425 U.S. 130 (1976); Georgia v. United States, 411 U.S. 526 (1973). *See also* United Jewish Organizations v. Carey, 430 U.S. 144 (1977) In *Georgia*, the Court found that by extending the Act for another five years in 1970, Congress ratified the sweeping interpretation of section 5 in *Allen* and *Perkins*. *See* 411 U.S. at 533.

[105] Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

[106] 435 U.S. 110 (1978).

[107] *Id.* at 124.

[108] 439 U.S. 32 (1978).

Thus, one may conclude that the scope of section 5 is boundless. Even those who look favorably upon these results are quick to agree, however, that the Court has stretched the Act beyond its natural limits. As the Director of the Section 5 Unit of the Justice Department's Civil Rights Division has frankly acknowledged, "[m]ere impact on the political process as the defining principle for section 5 coverage . . . could lead to a slippery slope down which falls nearly everything that a political jurisdiction does. Congress probably did not intend section 5 to become such an all-encompassing mechanism."[109] Conceivably, the preclearance requirement could be extended to cover every act of government at the state and local level, inasmuch as any change ultimately affects, directly or indirectly, minority group interests. Reaching conflicting results, lower federal courts have already dealt with the question whether political parties are subject to section 5.[110] Apparently, zoning changes, gerrymandering, and the location of public schools and housing projects are all likely candidates for future extensions of section 5, since these matters arguably may affect minority voting strength. Case law indicates that only court-ordered reapportionment plans and other court-ordered electoral changes are clearly exempt from the broad sweep of section 5.[111]

Behind these developments lies a radical redefinition of the right to vote in American politics. The Voting Rights Act was launched for the purpose of giving minority groups greater access to the ballot. Supreme Court decisions since the watershed case of *Allen v. State Board of Elections*[112] have shifted the focus from access to result:

> They assume a Federally guaranteed right to maximum political

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[109] MacCoon, *supra* note 56, at 114.

[110] *Compare* Williams v. Democratic Party, No. 16286 (N.D. Ga. April 6, 1972), *aff'd mem.*, 409 U.S. 809 (1972) *and* United States v. Democratic Executive Comm., No. 70-6047 (S.D. Ala. Dec. 22, 1970) (political parties are *not* subject to section 5) *with* MacGuire v. Amos, 343 F. Supp. 119 (M.D. Ala. 1972) *and* Wilson v. North Carolina State Bd. of Elections, 317 F. Supp. 1299 (M.D.N.C. 1970) (political parties *are* covered by section 5). The Act's definition of "vote" refers specifically to both party primaries and general elections. 42 U.S.C. § 1973 1(c)(1) (1976).

[111] MacCoon, *supra* note 56, at 114-16.

[112] 393 U.S. 544 (1969).

> *effectiveness*. Nowadays local electoral arrangements are expected to conform to Federal executive and judicial guidelines established to maximize the political strength of racial and ethnic minorities, not merely to provide equal electoral opportunity. . . . That no one in 1965 contemplated such a development is indisputable.[113]

In brief, both the Act and the fifteenth amendment have become an instrument for elevating the traditional right of equal *opportunity* to a new plateau of equal *result*.

IV. *City of Rome v. United States*: THE NEW EQUAL PROTECTION GUARANTEE OF THE FIFTEENTH AMENDMENT

The basic structure of government in the City of Rome was established under a charter granted by the state legislature in 1918. The charter provided for a seven-member commission, with one member from each of seven wards. In 1929, two additional wards were annexed, raising the total to nine. Members of the Commission were elected concurrently, at-large, by plurality vote, and they were also required to meet a residency requirement. In addition, the charter made provision for a Board of Education consisting of five members, to be elected in the same manner with the exception of a residency requirement.[114]

In 1966, soon after the Voting Rights Act was passed, the Georgia General Assembly amended the City's charter in order to make numerous changes in Rome's system of government. The plurality vote requirement for members of the Commission and Board of Education was changed to majority vote, and provision was made for primary and run-off elections; the number of wards was reduced from nine to three, with one commissioner from one of three numbered posts in each ward; the size of the Board of Education was increased from five to six members, with one member from one of two numbered posts in each of three wards and each candidate required to be a resident of the ward in which he ran; staggered elections for members of the Commission and Board of Education were instituted; restrictions on voter qualifications were eased; and the task of voter registration was transferred to the county. In the period following November 1, 1964, some sixty annexations were also effected, either by local ordinance or state law.[115]

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[113] Thernstrom, *supra* note 72, at 50.

[114] City of Rome v. United States, 472 F. Supp. 221, 223 (D.D.C. 1979).

[115] *Id.* at 224.

Not until 1974, when the City submitted an annexation for section 5 preclearance, did the Attorney General learn of these numerous changes. Rome then submitted each one to the Attorney General for approval, with the exception of the transfer of voter registration to Floyd County, which the Attorney General did not oppose. After examining the various changes, the Attorney General agreed to preclear forty-seven of the sixty annexations, the reduction of wards from nine to three, the increase in the size of the Board of Education from five to six, and the liberalization of voter qualifications. But the Attorney General objected to thirteen annexations, the provisions for majority vote, run-off, numbered post and staggered term elections, and the residency requirement for Board of Education elections.[116] Nine of the thirteen tracts of land were actually vacant when they were annexed by the city.

The City of Rome then brought suit challenging the Attorney General's actions on six grounds. During the course of litigation, two of the plaintiff's claims were eliminated,[117] leaving the following four claims: (1) That Rome was entitled to "bail-out" from coverage under section 4 of the Voting Rights Act; (2) That some or all of the changes to which the Attorney General was opposed had actually been precleared; (3) That section 5 was an unconstitutional exercise of Congressional power; and (4) That the disputed changes had neither the purpose nor the effect of denying or abridging the right to vote on the basis of race. Significantly, the City did not rely on Justice Harlan's key opinion in *Allen* concerning the scope of section 5 and its application to Rome's electoral changes, or raise the issue of whether it was intended or proper to view section 5 in light of the fourteenth amendment and the "vote dilution" rationale set forth in the reapportionment cases. In foregoing the opportunity to lay bare the jerry-built foundation of the *Allen* case, the City necessarily obscured its fourth claim regarding the purpose and effect test. Preferring to attack Congress rather than the courts and follow Justice Black's line of *Katzenbach* dissents in a frontal, if not suicidal, assault against Congress' enforcement powers under the fifteenth amendment, Rome further weakened its position by failing to confront the Congressional debates on the Ku Klux Klan Act of 1871, the one and only instance when the framers and backers of the

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[116] *Id.* at 229.

[117] Rome's allegation that the Attorney General had acted unconstitutionally in applying section 5 to the City was dismissed on the basis of *Morris v. Gressette*, 432 U.S. 491 (1977), and *Briscoe v. Bell*, 432 U.S. 404 (1977). The City conceded that it was the kind of jurisdiction subject to section 5 as determined by the *Sheffield* case.

Reconstruction Amendments explored in depth their understanding of Congress' enforcement powers. Nor did the City of Rome invoke the legislative history of the fifteenth amendment to challenge the Voting Rights Act, a fruitful source of information that would have buttressed its constitutional case.

No less exceptional is the utter failure of the Justice Department to produce evidence that any of the numerous electoral changes promulgated by the City of Rome had the purpose of discriminating against the City's handful of Negro voters. Indeed, the evidence is so supportive of the City's good intentions and the prevalence of long-standing, mutually agreeable race relations and voting practices, as to warrant extensive reiteration. The District Court's findings, based on exhaustive testimony, revealed that the City of Rome had not employed any literacy tests or other devices as a prerequisite to voter registration for seventeen years—before the magic date of November 1, 1964. Although registrants were technically required to pass the Georgia literacy or character tests, affidavits of registration officials, supported by the unanimous testimony of black deponents, showed that such tests had never been applied in a discriminatory manner, and in recent years had not been used at all. Likewise, Rome had not attempted to impede registration through manipulation of requirements relating to time and place, registration personnel, purging or re-registration. In the period from 1964 to 1974, Negro registration remained at a relatively high level, which the District Court conceded was "[a]lso probative of the lack of discrimination in registration. . . ."[118]

Moreover, the evidence showed that Negroes had not been denied access to the ballot through the inconvenient location of polling places, the actions of election officials, or the treatment of illiterate voters. No obstacles had been placed before black candidates with respect to slating of candidates, filing fees, or access to voters at polling places. Further, whites, including city officials, had encouraged Negroes to run for office in Rome, and one Negro was even appointed to the Board of Education.[119]

Outside the area of voting, the record was equally free of discrimination. The elected officials and city manager of the City, concluded the District Court,

> are responsive to the needs and interests of the black community. The City has not discriminated against blacks in the provision of

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[118] 472 F. Supp. at 224.

[119] *Id.* at 225.

> services and has made an effort to upgrade some black neighborhoods. The City transit department, with a predominantly black ridership, is operated through a continuing City subsidy. And the racial composition of the City workforce approximates that of the population, with a number of blacks employed in skilled or supervisory positions.[120]

Finally, the city demonstrated that because Negroes in the City of Rome usually held the balance of power in municipal elections, white candidates "vigorously" sought their support and "spent proportionally more time campaigning in the black community"[121] than in their own.

In response to such overwhelming evidence rebutting the presumption of discrimination, the federal government offered only one argument—the crux not only of this case but of almost the whole body of federal law that had grown out of the *Allen* rationale: All this is true, but "most black voters would prefer to have a black official representing their interests."[122] The obvious assumption, which the City had quite successfully refuted, was that whites could not fairly represent the interests of the minority, so the case turned not on any discernible denial of voting rights but on the racial preferences of the blacks for black officeholders and their collective "right" to hold office through proportional representation. The Court noted that only four Negroes had ever sought office in Rome; and evidence existed, though not conclusive, of bloc voting, which weighed heavily against the city.[123] That bloc voting perpetuating the division between the black and white communities would be an absolute certainty if the blacks were given their own seat on the Commission and Board of Education did not enter into the Court's discussion.

Thus committed to a "winner-take-your-share" theory of elections, or a separatist view of fundamental fairness based on the notion that no racial minority shall be denied the right to political representation, the District Court predictably ruled against the City of Rome on all four counts. Rome's request to "bail-out" from section 5's coverage was rejected on the ground that Congress did not intend that municipalities in covered states should be permitted to exempt themselves independently, as this practice would create an administrative burden on the Justice Department and open the door to a resurgence of the "same evils" which the Act was designed to eliminate[124]—an argument that hardly seemed applicable to a city like Rome that already had established a commendable record of race relations. Rome's argument that the Attorney General's preclearance of the Georgia Municipal Election Code in 1968 also constituted preclearance of the City's electoral changes was countered by the argument that "submission of state laws authorizing municipalities to adopt certain provisions in their charters does not constitute submission of the actual exercise of this authority by local government"[125]—a position seemingly exacerbating the Justice Department's administrative burden. The City's constitutional challenge to section 5, alleging that the preclearance requirement exceeded Congress' enforcement powers, violated the tenth amendment and the Guarantee Clause, and infringed the rights of private plaintiffs joined in the suit, was dismissed on the basis of *South Carolina v. Katzenbach*.[126] Acknowledging the presence of "an undercurrent of dissent" within the ranks of the Supreme Court on this issue, the District Court nevertheless declined the plaintiff's invitation "to a life of high adventure," noting that "[f]ar from backing away from *Katzenbach* the Court has in the ensuing years often cited that case with approval."[127]

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[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* One unsuccessful Negro candidate for office "did receive a sizeable number of white votes"—45 percent of the total votes cast in a run-off election in a city with only 15 percent Negro registration. *Id.* at 227.

In response to the City's claim that Congress lacked the enforcement power to prohibit a state or local unit of government from implementing voting changes that had the effect but not the purpose of diluting Negro voting strength, the District Court agreed that the issue of "[w]hether the Fifteenth Amendment reaches only purposeful discrimination is an important and unsettled constitutional question" which the Supreme Court had "never explicitly addressed. . . ."[128] Even if the amendment itself reached only purposeful discrimination, however, "Congress was within its broad enforcement power . . . when it outlawed voting changes discriminatory in effect only." This bold pronouncement suggesting that Congress' section 2 enforcement powers exceed the substantive provisions of section 1 of the fifteenth amendment, despite the words of limitation that Congress is empowered to enforce only "these provisions," amounts to little less than a complete nationalization of state electoral processes. The Court's statement further assumes, of course, that Congress did in fact outlaw voting changes "discriminatory in effect only" by enacting the Voting Rights Act, an assumption made by Chief Justice Warren in the *Allen* case that rests, as noted earlier, on precarious footing. Thus the real question, not raised in these proceedings, is not simply whether Congress may outlaw state voting practices under the fifteenth amendment that merely dilute Negro voting strength and impede the election of Negroes, but also whether Congress ever intended to do so in the first place. The District Court's foray into "a life of high adventure" to find the outer limits of Congress' mysteriously expanding enforcement powers, which began with a refusal to take the first step when asked to reexamine *Katzenbach* and ended here with the discovery of a new galaxy of legislative power in *City of Rome*, was possible then only because Justice Harlan's crucial dissent in *Allen* was never launched to intercept the mission.

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[124] *Id.* at 231-32.

[125] *Id.* at 233.

[126] 383 U.S. 301 (1966).

[127] 472 F. Supp. at 235.

[128] *Id.* at 237.

The District Court found additional support for its liberal construction of the enforcement power in *Ex parte Virginia*[129] and *McCulloch v. Maryland*.[130] "Let the end be legitimate, let it be within the scope of the constitution," Chief Justice Marshall had declared in *McCulloch* in his classic formulation of the Necessary and Proper Clause, "and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[131] Such was the test of Congressional enforcement power that the Supreme Court had applied back in *South Carolina v. Katzenbach*,[132] when it first examined the constitutionality of the Voting Rights Act, and the District Court found that test dispositive in determining whether Congress could properly prohibit electoral practices under the fifteenth amendment that had only a discriminatory effect. Under the *McCulloch* standard, said the court, "we have no doubt but that section 5's ban on 'effect' discrimination is an appropriate means even if it is assumed that the desired end is solely the elimination of purposeful discrimination,"[133] because "discriminatory effects raise a legitimate, and often compelling, inference of purpose."[134]

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[129] 100 U.S. 339 (1879).
[130] 17 U.S. (4 Wheat.) 316 (1819).
[131] *Id.* at 421.
[132] 383 U.S. 301, 326 (1966).
[133] 472 F. Supp. at 238.
[134] *Id.*

This inference, implicit in the Voting Rights Act, was based on a thorough investigation by Congress, which

> could well have concluded that wholesale evasion of the Act was likely unless discriminatory effects could be taken as conclusive evidence of purpose. . . . In effect, Congress can be said to have instructed the courts that the existence of racially disproportionate impact raises an irrebuttable presumption of invidious purpose. We can see no constitutional impediment to Congress' taking such an approach.[135]

The assumption, once again, was that Congress took such an approach, an assumption which is not clearly supported by the record. The Court, in fact, cited no legislative history lending weight to this construction. It is noteworthy, however, that section 5 of the Senate version of the Voting Rights Act, S.1564, provided that in order for a state or political subdivision to obtain preclearance for a new voting practice, that entity had the burden of proving that such a change did not have the purpose "or" would not have the effect of denying or abridging the right to vote.[136] But the House version, H.R. 6400, used the conjunction "and." This choice of words was ultimately adopted by the Conference Committee and made a permanent fixture of the Act.[137] The Court's reasoning thus seems contrary to the deliberate intention of Congress and the wording of the statute; for if the burden rests on the state to show that its electoral change does not have the purpose *and* the effect of voter discrimination, and the state has met the burden with respect to purpose, simple logic leads to the conclusion that further inquiry into the effect of a particular change would be warranted only if the statute provided that the state must prove that its new voting practice did not have the purpose *or* the effect of voter discrimination.[138]

The District Court experienced little difficulty, however, in deciding that most of Rome's various electoral changes actually had a discriminatory effect. "With respect to the majority vote and runoff election provisions, the discriminatory effect is clear beyond peradventure."[139] Although the effects of numbered posts, staggered terms, and Board of Education residency provisions were somewhat less clear, the City offered no rebuttal to the expert testimony of the United States Commission of Civil Rights that such practices deprived the Negro community of an opportunity to elect a Negro through "single-shot" voting.[140] The annexations, however, posed a more difficult problem. Deferring to the Justice Department, which was willing to reconsider its objections to the annexation if the City agreed to revert to the plurality win system, the court denied the City's motion as regards the annexation and invited the City to renew its request for preclearance.

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[135] *Id.* at 238-39.

[136] *See* II B. SCHWARTZ, *supra* note 27, at 1533.

[137] *Id.* at 1592.

[138] In Senate debate on S. 1564, Senator Tydings, a principal spokesman for the bill in the Senate Judiciary Committee, gave a carefully prepared address on the Senate floor explaining each provision of the bill. In his remarks on section 5, Tydings asserted: "Although the word 'or,' which frequently has a disjunctive meaning, is used, it is intended that the petitioning state or subdivision must prove an absence of both discriminatory purpose and effect." *Id.* at 1533.

The City's second constitutional argument, resting on federalism and the tenth amendment, maintained that section 5 must be declared unconstitutional under the principles established in *National League of Cities v. Usery*.[141] In that case the Supreme Court held that the tenth amendment imposed a limitation on Congress' power to regulate commerce, and that Congress was therefore prohibited by the principle of federalism from extending minimum wage and maximum hour regulations through the commerce power to employees of state and local governments. The District Court refused to apply this reasoning to the Voting Rights Act, however, noting that the Supreme Court had reserved the question whether the tenth amendment also limited Congress' enforcement powers under the fourteenth amendment. If the Supreme Court were confronted with the issue, the District Court was nevertheless confident that the Justices would follow *Fitzpatrick v. Bitzer*,[142] a case decided only four days after *National League* and also written by Justice Rehnquist, which held that the eleventh amendment did not operate as a limitation on Congress' enforcement powers. "[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies," said the Court in *Fitzpatrick*, "are necessarily limited by the enforcement provisions of section 5 of the Fourteenth Amendment."[143] Both the tenth and eleventh amendments shared a common grounding in states' rights and the principles of state sovereignty.

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[139] 472 F. Supp. at 244.

[140] *Id.* The Commission described "single-shot" voting as a device which "'enables a minority to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates.'" *Id.* at n.90 (citation omitted). This technique is, of course, merely a form of bloc voting.

[141] 426 U.S. 833 (1976).

[142] 427 U.S. 445 (1976).

[143] *Id.* at 456.

By parity of reasoning, the enforcement power of Congress under the fifteenth amendment, which had a "common history" with that of the fourteenth, was not limited by the federal principle. "Although *Fitzpatrick* did not directly address the question presented here," the court concluded, "we find that analytically it compels a like result."[144]

In effect, then, the District Court assumed that Congress' enforcement powers are broader than its commerce power, a construction that is nowhere supported in the debates on the framing and adoption of the Reconstruction Amendments. Equally disturbing are the far-reaching implications of the decision: if the enforcement powers are not limited by the federal principle, apparently those powers are not limited at all, except by the self-restraint of Congress itself. Review of Congressional enactments by the Supreme Court is a potential limit on the exercise of power, of course, but in the absence of the tenth amendment few compelling reasons, if any, would exist to nullify federal statutes that would necessarily be directed against state action anyway. The District Court's reasoning thus leads to the extraordinary conclusion that the Reconstruction Amendments repealed the tenth amendment, a revolutionary doctrine that was roundly opposed, as will presently be seen, by the members of Congress who framed the Reconstruction Amendments. Moreover, the Court's analogy between the tenth and eleventh amendments overlooks the different purposes these amendments were designed to accomplish. The tenth amendment, encompassing the Constitution in entirety, was intended to limit the powers of the federal government to those delegated by the states, and to reaffirm the principle that those powers not delegated were reserved to the states and the people. The eleventh amendment, on the other hand, was adopted for the narrow purpose of reversing the Supreme Court's decision in *Chisholm v. Georgia*.[145] Although this provision limits the federal judicial power, the amendment is directed not against the federal government as such but against out-of-state and foreign citizens. The amendment simply bars suits against a state by citizens of other states, and by its terms does not even bar a suit by a citizen against his own state. In short, the eleventh amendment is almost totally unrelated to relations between the federal government and the states and matters affecting the division of power between two levels of government. It is the tenth amendment which addresses the question of power in the federal system. The eleventh amendment deals solely with the issue of sovereign immunity and seeks to protect the states not against the federal government but merely against suits by out-of-state citizens. To treat the two amendments as an embodiment of the same principles and purposes is to misconstrue the meaning of federalism under the American constitutional system.

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[144] 472 F. Supp. at 240.

[145] 2 U.S. (2 Dall.) 419 (1793).

Turning finally to the two remaining constitutional issues raised by *City of Rome*, the District Court quickly disposed of both in summary fashion. The City's contention that section 5 constituted a violation of the Guarantee Clause was dismissed as a political question not amenable to judicial resolution. In reply to the private plaintiff's complaint that the actions of the Attorney General and the operation of section 5 had prevented the City from holding elections since 1974 in contravention of the plaintiffs' civil rights, the District Court responded with the curious observation that the City of Rome was equally to blame because it had refused to cooperate with the Attorney General. But "even if fundamental interests were at stake . . . ," concluded the court, "we believe section 5 of the Act is justifiable in advancing the compelling national interest of enforcing the Fifteenth Amendment by 'erasing the blight of racial discrimination in voting.'"[146] Whether this statement meant that fifteenth amendment rights were to be preferred to the so-called "Fundamental Freedoms" of the first amendment the Court did not say.

On appeal, *City of Rome* was argued before the Supreme Court during the October Term, 1979. In affirming the judgment of the lower court, a divided Supreme Court, speaking through Justice Marshall, closely followed the path of reasoning blazed by the District Court, although with less attention to the finer points developed by the District Court. Among the usual outpouring of concurring and dissenting opinions,[147] only Justice Rehnquist, joined by

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[146] 472 F. Supp. at 242 (citations omitted).

[147] Justices Blackmun and Stevens concurred, the former conditioning his approval on matters relating to annexation, the latter emphasizing the right of Congress to regulate voting practices in Rome even though "there has never been any racial discrimination practiced in the city." 446 U.S. at 190 (Stevens, J., concurring). In dissent, Justice Powell contended that the Court's ruling conflicted with *Sheffield* and argued that the Court had misinterpreted the "bail-out" provisions of section 4 of the Act. "The Court today," Justice Powell observed, "decrees that the citizens of Rome will not have direct control over their city's voting practices until the entire State of Georgia can free itself from the Act's restrictions." *Id.* at 203 (Powell, J., dissenting). This interpretation, he complained, would only serve to "vitiate the incentive for any local government in a state covered by the Act to meet diligently the Act's requirements." *Id.* at 206 (Powell, J., dissenting.)

Stewart, vigorously opposed the Court's interpretation of the Act and insisted that Congress' enforcement powers were limited by the substantive provisions of the fifteenth amendment. No member of the Court challenged the constitutionality of the Act in line with Justice Black's earlier dissents, or picked up on Justice Harlan's astute criticisms in *Allen* concerning the scope of section 5.[148] Rehnquist did insist, however, that since the enforcement power is a "remedial" grant of authority, then the duty of the Court, in keeping with *Marbury v. Madison*, was "to ensure that a challenged Congressional Act does no more than 'enforce' the limitations on state power established in the Fourteenth [Amendment]."[149] In this case there was no wrong to remedy because the City of Rome had engaged in no purposeful discrimination; and any dilution of the black vote associated with the electoral changes at issue was the result of bloc voting—a matter of private rather than governmental discrimination. Asserting that "the Constitution imposes no obligation on local governments to erect institutional safeguards to ensure the election of a black candidate,"[150] and further insisting that Congress does not have the power to impose such a duty, Rehnquist drew the curtain on *City of Rome* with a stinging rebuke of the producers and directors for having abandoned the script of prior case law:

> To permit congressional power to prohibit the conduct challenged in this case requires state and local governments to cede far more of their powers to the Federal Government than the Civil War Amendments ever envisioned; and it requires the judiciary to cede far more of its power to interpret and enforce the Constitution than ever envisioned. The intrusion is all the more offensive to our constitutional system when it is recognized that the only values fostered are debatable assumptions about political theory which should properly be left to the local democratic process.[151]

Rehnquist's parting shot suggesting that the Court had rewritten the fifteenth amendment to accommodate the majority's own theory of representation reflected the concern expressed earlier by Justice Harlan in his *Allen* dissent that the Court's insistence on Negro officeholders was not necessarily in the best interest of the minority. "It is not clear to me," Harlan confessed, "how a Court would go about deciding whether an at-large system is to be preferred over a district system. Under one system, Negroes have some influence in the election of all officers; under the other, minority groups have more influence in the selection of fewer officers."[152] To be sure, a white majority dominating a multi-member commission would be better able to ignore the interests of the Negro community if the majority were spared the trouble of campaigning in that community for political support and could vote down the lone black representative without fear of reprisal. Having undermined the need for coalition-building, the Court, in other words may have actually isolated the minority and in effect given it a meaningless role in the political process. And there may be additional consequences, as yet unseen. The Court's theory of representation apparently creates "incentives to keep a city ghettoized. Once a ward system is instituted, the geographical dispersion of blacks cuts in to black power."[153] In brief, the Court's main accomplishment may well be "[t]he political polarization of the society along racial and ethnic lines . . ."[154] and a concomitant decline in the political efficacy of the Negro minority.

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[148] In a footnote, however, Justice Rehnquist indicated an awareness of the issues raised by Justice Harlan, although Justice Rehnquist did not pursue the matter further. Noting that the Voting Rights Act is an exercise of fifteenth amendment power and that vote dilution devices involve the fourteenth amendment, Justice Rehnquist nevertheless deferred to the Court's position that the Act may be applied to remedy violations of the fourteenth amendment. 446 U.S. at 207-08 n.1 (Rehnquist, J., dissenting).

[149] *Id.* at 211.

[150] *Id.* at 219.

[151] *Id.* at 221.

Looming ominously in the background is yet another disturbing aspect about *City of Rome* that led Justice Powell to condemn the Court's decision on grounds of fundamental fairness. "Even though Rome has met every criterion established by the Voting Rights Act for protecting the political rights of minorities," Powell complained, "the Court holds that the City must remain subject to preclearance."[155] The larger issue, which the Court has not fully addressed, is the overinclusiveness of section 4 of the act, which punishes the innocent as well as the guilty by hurling all local communities of a covered state, irrespective of their different racial, ethnic, political, and historical backgrounds, into a common jail. Indeed, the problem, which was hotly debated in Congress in 1965, 1970 and again in 1975, extends to the discriminatory treatment of certain states, primarily in the South, many of which have also made substantial progress in the area of race relations but are unrewarded for their actions and unable, like the City of Rome, to bail out and resume their independence on an equal footing with other members of the Union. That the coverage formula in the original Act was also politically motivated and arbitrary even within the South is suggested by the fact that such states as Tennessee, Kentucky, Florida, and President Johnson's own state of Texas were exempted, notwithstanding their record on voter discrimination. Indeed, coverage was aimed almost exclusively at the Deep South, which had supported Barry Goldwater in the 1964 presidential election.[156]

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[152] Allen v. State Bd. of Elections, 393 U.S. 544, 586 (1969) (Harlan, J., dissenting), *as quoted in* 446 U.S. at 219 (Rehnquist, J., dissenting).

[153] Thernstrom, *supra* note 72, at 65.

[154] *Id.* at 75.

[155] 446 U.S. at 196 n.4.

The case of Virginia amply demonstrates the inherent arbitrariness of the Act. Appearing before the Subcommittee on Constitutional Rights of the Senate Judiciary in 1975 to testify against the most recent extension of the Voting Rights Act, Attorney General Andrew Miller of Virginia pointed out that in 1965 Virginia was the only state, other than Alaska, which was "triggered" by the Act in the absence of any evidence of racial discrimination in voting. In fact, extensive investigations conducted by the United States Commission on Civil Rights in the Commonwealth in 1961 revealed that black citizens in Virginia, to quote the Commission's report, encountered "no significantly racially motivated impediments to voting."[157] Yet states where voting discrimination was known to exist were exempted from the preclearance provisions of section 5 because they did not maintain any literacy tests. Paradoxically, the Virginia literacy test simply required applicants to provide routine information in their own handwriting concerning their names, addresses, age and occupation.

Superimposed on this matrix of arbitrary presumptions, the

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[156] Testifying against extending the Act in 1975, Senator James Allen (D.-Ala.) observed that

> when the theory of this . . . [Act] was evolved, it was first determined which States the law should be made applicable to, and then they proceeded to find the formula that would end up with those States being covered. And, by using the 50 percent voting in the election factor, that would have included the State of Texas. The President of the United States being a resident of Texas, a citizen of Texas, it was thought inadvisable to include Texas in that formula. So they added a second circumstance, that is, that they must have a device that would hinder registration; namely, the literacy test. And, the double factor . . . is what took Texas out from under it, because they did not have the literacy test.

1975 Senate Hearings, supra note 32, at 24. Senator Strom Thurmond (R.-S.C.) charged earlier that "[t]he Voting Rights Act of 1965 was a punitive measure designed to punish the States that supported Goldwater for President." *Hearings on Amendments to the Voting Rights Act of 1965 Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee*, 91st Cong., 1st & 2d Sess. 7 (1969 & 1970).

[157] *1975 Senate Hearings, supra* note 32, at 825.

Virginia Attorney General observed, was the Supreme Court's decision in *Gaston County v. United States*[158] which doomed Virginia's chances of a bailout by prohibiting any state from terminating coverage if discrepancies in educational opportunity previously existed in that jurisdiction. In any action brought under section 4(a) of the Act, the Court concluded, it was "appropriate for a court to consider whether a literacy or educational requirement has the 'effect of denying . . . the right to vote on account of race or color' because the State or subdivision which seeks to impose the requirement has maintained separate and inferior schools for its Negro residents who are now of voting age."[159] That a lack of educational opportunities for Negroes was a national rather than a local phenomenon highlighted the discriminatory effect of the *Gaston* ruling, in Attorney General Miller's estimation, and he cited numerous examples, based on decisions of the Supreme Court and other federal sources, to prove his point.[160]

Instead of amending the Act in light of the *Gaston* decision to bring within its scope all states maintaining literacy tests in which such disparities were found—i.e., all states with literacy tests—Congress in 1970 suspended the use of all literacy tests throughout the country. But Congress did so without compelling the other states which had literacy tests, such as Massachusetts, Maine, New Hampshire and Connecticut, to conform to the requirements of section 5, thereby leaving intact the original discrimination against Virginia and the other states singled out in the 1965 Act.[161] Virginia apparently was denied relief from section 5 solely because of a pre-existing lack of equal educational opportunities. Thus, the Voting Rights Act suffers from basic inequities prejudicing not only Virginia but also jurisdictions like the City of Rome that are caught up in seemingly irrebuttable presumptions over which they have no control.

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[158] 395 U.S. 285 (1969).

[159] *Id.* at 293.

[160] Summarizing these findings, the Virginia Attorney General noted the following: (1) Unequal educational opportunity for blacks and whites, whether defined in terms of literacy ability, school facilities and expenditures, or segregation, is not confined to any region of the United States; (2) Blacks lag behind whites in literacy ability and reading comprehension in each region of the nation; (3) A greater percentage of blacks than whites was illiterate in each of the states which maintained literacy tests in 1964 but which were not subjected to the proscriptions of section 5; (4) In each of the literacy test states not subject to section 5 the percentage of black students more than one year behind the school in 1950 exceeded the percentage of white students more than one year behind by increasing margins; (5) A substantial portion of the black students in each of the literacy test states not subject to section 5 in 1970 attended majority black schools and schools in which 95 percent or more of the students were black; and (6) Because of the educational disadvantages suffered by blacks, the use of literacy tests in those states not subject to section 5 has a disproportionate impact on blacks. *1975 Senate Hearings*, *supra* note 32, at 821-22.

[161] *Id.* at 828.

V. THE CONSTITUTIONALITY OF THE VOTING RIGHTS ACT OF 1965: SOME UNANSWERED QUESTIONS

A. The Scope of the Fifteenth Amendment and the Question of Original Intent

The Reconstruction Amendments, proposed and adopted between 1865 and 1870 in a period of profound civil unrest and political turmoil,[162] have surely introduced more uncertainty and confusion into American law than all of the other provisions of the Constitution combined.[163] Much of this uncertainty stems from the vagueness of certain provisions in the amendments, and the conflicting interpretations of their purpose and meaning offered by those who participated in their creation. In his authoritative study of the question whether the framers and backers of the fourteenth amendment intended to incorporate the Bill of Rights into the word "liberty" of the Due Process Clause, thereby making the first eight amendments applicable to the states, Charles Fairman has warned that one should not expect clarity and precision on all points in the historical record. "We know so much more about the Constitutional law of the Fourteenth Amendment than the men who adopted it," Fairman observes, "that we should remind ourselves not to be surprised to find them vague where we want them to be sharp. Eighty years of adjudication has taught us distinctions and subtleties where the men of 1866 did not even perceive the need for analysis."[164] Adding to the confusion and impeding understanding is the position taken by some members of the modern Court that the original intent of the framers, even when ascertained, is not binding on the Justices. Thus in reply to Justice Harlan's exhaustive analysis of the historical record in *Oregon v. Mitchell*, demonstrating convincingly that the fourteenth amendment was never intended to "authorize Congress to set voter qualifications, in either state or federal elections,"[165] Justices Brennan, White and Marshall responded that they "could not accept this thesis even if it were supported by historical evidence."[166] Justice Douglas dismissed Harlan's findings with the assertion that they were simply "irrelevant."[167] In the effort to clarify the scope and purposes of the fifteenth amendment, therefore, one is confronted not only with the problem of conflicting views among the authors of the amendment, but also with a seeming indifference, if not hostility, among certain members of the Court toward the original intent of the framers even when that intent is known.

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[162] *See generally* C. BOWERS, THE TRAGIC ERA (1929); J. BURGESS, RECONSTRUCTION AND THE CONSTITUTION (1902); E. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION (1960); J. RANDALL, THE CIVIL WAR AND RECONSTRUCTION (1937); K. STAMPP, THE ERA OF RECONSTRUCTION: 1865-1877 (1965).

[163] One writer has estimated that the fourteenth amendment alone "is probably the largest source of the Court's business, and furnishes the chief fulcrum for its control of controversial policies." R. BERGER, *supra* note 11, at 1.

[164] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 9 (1949). "When one realizes how little the men of 1866 foresaw the part the Supreme Court was going to play in working out the Fourteenth Amendment's guarantees of civil rights," Fairman further observes, "it is no wonder that they did not fix their minds squarely on the question the court had to face in 1873 and which is raised again today: what is the *standard* by which to test state action alleged to violate the Fourteenth Amendment?" *Id.* at 23-24.

Since the enactment of the Voting Rights Act in 1965, the Court has had numerous opportunities, beginning with *South Carolina v. Katzenbach*,[168] to examine the Act in the terms of the original intent and understanding of those who framed the fifteenth amendment.

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[165] 400 U.S. at 154.

[166] *Id.* at 251.

[167] *Id.* at 140. Speaking for all of the members of the Court, Chief Justice Warren announced in *Brown v. Board of Education*, 347 U.S. 483, 489, 492 (1954), that "we cannot turn back the clock to 1868" and summarily rejected evidence concerning the original understanding of the equal protection clause as "inconclusive." *See also* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966) (the Court is not confined to historic notions of equality); Trop v. Dulles, 356 U.S. 86, 101 (1958) (evolving standards of decency define the substance of the eighth amendment). One of the earliest calls for judicial legislation was that of J. Gray, The Nature and Sources of the Law 183-84 (1909), who suggested that the difficulty of the amending process gave courts freedom of interpretation. *See generally* T. Taylor, Two Studies in Constitutional Interpretation 14 (1969) (the original understanding must be "leavened" by "considered consensus"); Grey, *Do We Have an Unwritten Constitution?*, 27 Stan. L. Rev. 703 (1975) (the Court properly expounds upon national ideals not mentioned in the Constitution); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. Chi. L. Rev. 661, 686 (1960) (the Supreme Court is the "national conscience" for the American people). Such pronouncements are rarely encountered in the old reports, which more uniformly reflect an attitude of deference toward the original intent of the framers: In "the construction of the language of the Constitution . . . as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument." *Ex parte* Bain, 121 U.S. 1, 12 (1887).

[168] 383 U.S. 301 (1966).

To what extent did the amendment, as originally conceived, contemplate federal regulation of suffrage? What powers, according to the framers, did the amendment confer upon Congress under the Enforcement Clause? Though such inquiries would seem to be a part of the ordinary course of judicial decision-making, the Court has never made them; and in *City of Rome* not even the City officials raised these questions. Had the officials done so, the decision might have produced a different result. At the very least, these questions would have brought pressure upon the Court to justify its holdings in the face of overwhelming evidence that the Voting Rights Act is clearly inconsistent with the aims and purposes of the fifteenth amendment.

Studies by historians, political scientists, and constitutional scholars on the framing and adoption of the fifteenth amendment have been readily available since the turn of the century, so the subject is hardly an arcane obscurity that would tax judicial resources. Writing in 1909, John Mathews, a political scientist at Johns Hopkins University, concluded after examining the debates that "[u]nder the Amendment as actually passed . . . the power still remained with the States to prescribe all qualifications which they had previously been competent to prescribe, with the exception of the three named in the Amendment."[169] This understanding was confirmed and considerably broadened in 1965 by the historian, William Gillette, whose carefully documented monograph has become the standard reference on the origins of the fifteenth amendment.[170]

Debates in Congress on the amendment, extending from January to February of 1869, were extensive and complex. These debates involved many all-night sessions, produced incredibly complicated parliamentary maneuvers and entanglements, and filled some three hundred pages of the *Congressional Globe*. Passage of the amendment, at times in doubt, was a victory for the moderates in Congress, who were able to compromise the conflicting positions of those who opposed Negro suffrage, and the radical Republicans who wanted to federalize the electoral process. What was widely understood in 1869 but was not generally realized in later years, until Gillette's study appeared, was that the "primary goal" of the fifteenth amendment "was the enfranchisement of Negroes outside the deep South."[171] Although the amendment would guarantee suffrage to the newly emancipated slaves and protect them against future disenfranchisement, many were already exercising the franchise—at first under military reconstruction and later under new state constitutions. The unenfranchised northern Negroes, on the other hand, stood to benefit principally from the amendment, and would presumably become loyal Republicans.[172]

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[169] J. MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 44 (1909).

[170] W. GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT (1965).

In early January, various amendment proposals were offered to protect the Negro voter by prohibiting literacy tests and poll taxes. Some versions also sought to guarantee the right of Negroes to hold public office. In time, however, these suggestions were abandoned for lack of support, and the advocates of Negro suffrage were compelled to settle for more modest gains. One of the first advocates to come forward was Representative George Boutwell, a radical Republican from Massachusetts, who introduced an amendment stipulating that "'the right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of race, color, or previous condition of slavery of any citizen or class of citizens of the United States.'"[173] In competition with Boutwell's proposal were amendments offered by the Ohio Republican radical, Samuel Shellabarger, and his colleague, also from Ohio, John Bingham. Shellabarger, a powerful advocate of Negro rights, proposed to confer the right to vote on all males over the age of twenty-one, except former rebels, and to abolish all state literacy and property tests. Bingham's more moderate substitute favored the idea of granting suffrage in both the Negroes and ex-confederates, with a one-year residency requirement. All three amendments were negative in the sense that they prohibited the states from exercising certain powers, and none sought to abolish primary control of suffrage by the states. On January 30, the House rejected both the Shellabarger and Bingham amendments, and passed the Boutwell amendment with the necessary two-thirds majority.

Meanwhile, the Senate was considering an amendment proposed by the Republican moderate from Nevada, William Stewart. Stewart reluctantly endorsed Negro suffrage, but opposed Chinese suffrage. Unlike Boutwell's proposal, Stewart's amendment was couched in affirmative language and guaranteed the right of the Negro to hold office. With the passage of the Boutwell amendment, the Senate dropped Stewart's plan to consider the House version. During the course of this protracted debate, the Senate also considered and rejected an amendment introduced by Senator Jacob Howard of Michigan, which specified "African suffrage" and left the states the power to impose education and property tests to disenfranchise Negroes, and yet another supported by Senator Henry Wilson of Massachusetts which sought to abolish all qualifications for either voting or holding office because of "race, color, nativity, property, education or religious belief."[174] But only hours after Wilson's amendment was defeated on February 9, the Senate reversed course and adopted a modified version which guaranteed the right to hold office, but did not prohibit the states from setting qualifications for holding office. Now seemingly in control, the radical Republicans quickly added a proposed sixteenth amendment to reform the Electoral College and sent the package to the House.

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[171] *Id.* at 46.

[172] *Id.* at 46-49.

[173] *Id.* at 53 (citation omitted).

Led by Boutwell, the House rejected the Senate amendment and requested a conference. Boutwell's cause was considerably strengthened now by the arch-radical Wendell Phillips, who actually favored a guarantee of Negro officeholding but was willing to support the Boutwell amendment because it was the only modest proposal that had a chance of success. With the defeat of the more extreme Wilson plan, the Senate returned to the original amendment offered by Senator Stewart, and on February 17 accepted it as preferable to the moderate Boutwell version because Stewart's proposal contained an officeholding provision. The House, however, rejected the Stewart amendment in favor of Bingham's earlier proposal, and the two houses appeared deadlocked.[175]

The stalemate was finally broken on February 24, however, by a conference committee, which dropped demands for officeholding and the ban on most suffrage tests, and recommended the Stewart rather than the Bingham amendment. The amendment thus proposed became the fifteenth amendment to the Constitution. The proposal adopted was actually identical to Stewart's amendment in form, but closely paralleled Boutwell's in substance. The Conference Committee deliberately omitted Negro officeholding and the proposed ban on state literacy, property and nativity tests because the inclusion of these factors might have jeopardized ratification. As Gillette has correctly observed,

> [t]his amendment was also a moderate one in that its wording was negative. It did not give the federal government the right to set up suffrage requirements, but left the fundamental right with the states. Framed negatively, it did not directly confer the

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[174] *Id.* at 59 (citation omitted).

[175] *Id.* at 60-70.

> right of suffrage on anyone, and the negative wording might obscure the major objective, which was to enfranchise the northern Negro.[176]

Debate on the enforcement clause was largely avoided.

From this brief survey of the debates in the Fortieth Congress, and "[b]y the amendments offered and rejected, it is clear that the framers did not intend to establish federal qualifications for suffrage or to abolish the state literacy tests."[177] Section 4(a) of the Voting Rights Act, which suspends literacy tests where such tests have been used to deny the right to vote on account of race would thus seem to be directly contrary to the original intent of the framers of the fifteenth amendment. A suspension or abolition of literacy tests, in other words, would not be an "appropriate" means of enforcing the amendment according to the understanding of the Fortieth Congress. In a probative and detailed analysis of the debates on the framing and adoption of the fifteenth amendment, which fully corroborates Gillette's findings, one constitutional scholar has concluded that "to abolish literacy tests is not an enforcement, but rather an amendment of the Fifteenth Amendment, and is not authorized by any constitutional power found in the national government."[178] The legislative history of the amendment clearly shows that the several states are free to impose or to abolish such voter requirements as literacy tests for any reason, "so long as these tests are applied [equally] . . . to members of all races."[179] The conclusion which necessarily follows is that Congress may not exercise its enforcement power to terminate such tests, and that section 4 of the Voting Rights Act exceeds the constitutional power of Congress. Thus, one may argue that the City of Rome cannot be subjected to the preclearance provisions of section 5 of the Voting Rights Act, as this requirement is triggered by section 4, which is *ultra vires* and therefore void.

B. The Scope of the Enforcement Power and the Question of Original Intent

In *South Carolina v. Katzenbach*,[180] (Katzenbach I), when the Supreme Court was first called upon to determine the constitutionality of the Voting Rights Act, the issue presented was whether Congress had "exercised its powers under the fifteenth amendment in an appropriate manner with relation to the States."[181] In response to South Carolina's contention that the Act exceeded the powers of Congress and violated the rights of the states reserved by the tenth amendment, Chief Justice Warren flatly stated that, "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[182] Warren did not offer an elaborate explanation of this sweeping assertion of federal power, but the clear implication was that federalism, in principle, did not operate as a limitation on Congress' enforcement powers.

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[176] *Id.* at 71-72.

[177] *Id.* at 72 n.108.

[178] Avins, *Literacy Tests and the Fifteenth Amendment: The Original Understanding*, 12 S. TEX. L.J. 24, 68 (1970).

[179] *Id.* at 71.

[180] 383 U.S. 301 (1966).

The rationality test, Warren further explained, was the one formulated by Chief Justice Marshall in *McCulloch v. Maryland*[183] in connection with Congress' implied power to enact legislation that is "necessary and proper" to carry into effect Congress' delegated powers. Thus, Congress' power under section 2 of the fifteenth amendment, which grants Congress the right "to enforce this article by appropriate legislation," could actually be read as a positive grant of power "to make all laws that are necessary and proper" to carry into effect the prohibition against racial discrimination in voting. In other words, Congress' enforcement power under section 2 was both an enumerated and an implied power.

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[181] *Id.* at 324.

[182] *Id.*

[183] 17 U.S. (4 Wheat.) 316 (1819). Is the "rational means" test of the Warren Court an echo of the *McCulloch* test of the Marshall Court, as Warren seems to claim? Marshall did not speak of "rational" means, but of "appropriate" means. These he defined as means which (1) "are plainly adapted" to a legitimate end, (2) "are not prohibited," and (3) are consistent "with the letter and spirit of the Constitution," *Id* at 420. Assuming that federalism is in keeping with the letter and spirit of the Constitution, Marshall's test, at least on the face of it, would seem to suggest that a law which pursued a legitimate end but violated the federal principle would be an inappropriate means to that end. Moreover, section 2 of the fifteenth amendment requires that legislation enacted by Congress be "appropriate," not "rational." The federal principle, in other words, is most assuredly an ommipresent feature of the *McCulloch* test and a limiting factor on the scope of Congress' powers, whether delegated or implied. That, at least, is the effect of the decisions since 1819 and the meaning attached to *McCulloch* by Marshall himself.

In a series of newspaper essays written in the summer of 1819 under the pseudonyms "A Friend of the Union" and "A Friend of the Constitution," Chief Justice Marshall endeavored to answer the critics of his opinion in *McCulloch* with the assurance that the Necessary and Proper Clause did not enlarge the powers of the national government. As Gerald Gunther has correctly observed,

> His [Marshall's] essays and their context indicate that he did not view *McCulloch* as embracing extreme nationalism. The degree of centralization that has taken place since his time may well have come about in the face of Marshall's intent rather than in accord with his expectations. . . . [H]e did not believe that Congress had an unrestricted choice of means to accomplish delegated ends. . . . Clearly these essays give cause to be more guarded in invoking *McCulloch* to support a view of Congressional power now thought necessary.

G. GUNTHER, JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 20 (1969). *See also* Bickel, *The Voting Rights Cases*, SUP. CT. REV. 101 (1966).

Warren then turned to sections 4 and 5 of the Voting Rights Act to apply the *McCulloch* test. At the heart of section 4 is the assumption that the remedial powers of Congress under the Enforcement Clause extend to state practices which may be "remedied" by Congress in the absence of a judicial declaration that such practices require a remedy. South Carolina objected to the suspension of its constitutionally acceptable literacy test on the basis of *Lassiter v. Northampton County Bd. of Elections*,[184] which had held that literacy tests were not in themselves contrary to the fifteenth amendment. The members of the Court in *South Carolina v. Katzenbach* were unanimously agreed, however, that Congress had the right to suspend these tests. Did this conclusion mean that Congress' enforcement powers included not only the power to remedy existing defects but also the power to declare, on Congress' authority alone, that a defect existed where the Court had said there was none before? Under section 4, Congress apparently was not remedying a defect in response to a judicial decision, but was in fact deciding for itself both the existence of a defect and the appropriate remedy.

Additionally, section 5 of the Voting Rights Act authorized Congress to prohibit the states from adopting laws of their own choosing, requiring states instead to enact measures acceptable to the Attorney General or the United States District Court for the District of Columbia. The established principle that the states have the right to enact their own electoral laws, good or bad, and await a judicial determination of constitutionality was thus rejected. In effect, section 5 imposed an affirmative duty on the states and their political subdivisions to enact legislation conforming to guidelines laid down by the federal government, and placed a single District Court in the position of issuing advisory opinions on state proposed electoral changes.

Chief Justice Warren conceded that "[t]his may have been an uncommon exercise of power."[185] Instead of the *McCulloch* test, however, Warren invoked the emergency doctrine of the *Blaisdell* case[186] and insisted that "the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."[187] In this portion of the opinion Warren observed that Congress "knew" that the states in the South would "resort to the extraordinary strategem" of devising new laws to circumvent the fifteenth amendment, and in anticipation of this event "Congress responded in a permissibly decisive manner."[188] Do "exceptional conditions" create new legislative powers? And how can there be an "exceptional condition" justifying this "uncommon exercise of power" before the condition exists? The Chief Justice did not say. Nor did Warren satisfactorily answer South Carolina's objection that section 5 improperly required the District Court to issue advisory opinions. A state wishing to make use of a change in its own voting laws, Warren remarked, "has a concrete and immediate 'controversy' with the Federal government."[189]

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[184] 360 U.S. 45 (1959).

[185] 383 U.S. at 334.

Justice Black, the one dissenter,[190] objected strongly to the Court's acceptance of section 5 of the Act as a valid exercise of Congressional power. In the first place, Black argued, a mere "desire" on the part of federal officials "to determine in advance what legislative provisions a state may enact"[191] was hardly the kind of dispute that can give rise to a justiciable controversy. "By requiring a State to ask a federal court to approve the validity of a proposed law which has in no way become operative, Congress has asked the State to secure precisely the type of advisory opinion our Constitution forbids."[192]

Secondly, continued Black, section 5 was clearly in conflict with the *McCulloch* test, which limits the enforcement powers of Congress to legislation that is not prohibited by the Constitution and is consistent with its letter and spirit:[193]

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[186] Home Bldg. and Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). Said the Court in *Blaisdell*: "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted. . . ." *Id.* at 425. Warren also cited *Wilson v. New*, 243 U.S. 332 (1917), in support of his proposition. But there the Court held that: "[A]lthough an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." 243 U.S. at 348. It is not entirely clear from the opinion whether the "exceptional conditions" refer to past or future discriminatory practices. Do *any* "exceptional conditions" warrant Congressional usurpation of state power under the emergency doctrine?

[187] 383 U.S. at 334.

[188] *Id.* at 335.

[189] *Id.*

[190] Black agreed with the Court's holding that section 2 of the fifteenth amendment permitted Congress to suspend state literacy tests, but apparently not on the basis of the emergency doctrine. 383 U.S. at 355-56 (Black, J., dissenting).

[191] *Id.* at 357.

[192] *Id.* at 357-58.

> Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws . . . without first sending their officials hundreds of miles away to beg federal authorities to approve them.[194]

By prohibiting the states from enacting legislation without the consent of federal authorities, section 5 actually provided for a Congressional veto of state laws, a power that was considered and specifically rejected by the Founding Fathers in 1787.[195] "The judicial power to invalidate a law in a case or controversy after the law has become effective," concluded Black, "is a long way from the power to prevent a State from passing a law. I cannot agree with the Court that Congress, denied a power in itself to veto a state law, can delegate this same power to the Attorney General or the District Court for the District of Columbia."[196] Section 5 of the Voting Rights Act reduced the states to "little more than conquered provinces."[197]

According to Justice Black, then, the enforcement powers of Congress~~, denied a power in itself to veto a state law, can delegate~~ mandates of the Constitution, and in particular by the federal principle. The test of constitutionality, he implied, was not the emergency doctrine, as the Court seemed to think, but *McCulloch*. As a general principle, Black indicated, "appropriate legislation" under section 2 of the fifteenth amendment is that which conforms to the letter and spirit of the Constitution and is not prohibited, either explicitly or implicitly, by the Constitution. Why this test resulted in acceptance of section 4 of the Act and the rejection of section 5, Black did not explain. But his reading of the Enforcement Clause seemed to indicate that Congress enjoys a broad power "to protect this right to

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[193] *Id.* at 358.

[194] *Id.* at 359. Black also contended that section 5 violated the Guarantee Clause of the Constitution. *Id.*

[195] Such a proposal was presented by the Governor of Virginia, Edmund Randolph, in the Virginia Plan. "The proceedings of the original Constitutional Convention," noted Black, "show beyond all doubt that the power to veto or negative state laws was denied Congress." *Id.* at 360. *See also* Justice Black's remarks, *id.* at 361, n.3.

[196] *Id.* at 361.

[197] *Id.* at 360.

under the Fifteenth Amendment were
restricted by

vote against any method of abridgement no matter how subtle,"[198] short of protection by means of a Congressional veto.

In subsequent cases involving the enforcement clauses of the thirteenth and fourteenth amendments, the Court has continued to render broad interpretations of Congress' remedial powers. In *Katzenbach v. Morgan*[199] (Katzenbach II) and in *Jones v. Alfred H. Mayer Co.*,[200] for example, the Court upheld sweeping federal legislation on the basis of Congress' powers "to enforce" the Reconstruction Amendments, without venturing to define, except in summary fashion, the range of Congress' enforcement powers. *City of Rome* is no exception. The Court has made no investigative effort to determine the original intent of the enforcement clauses, and has yet to shed any light on the issue. As a result, Congress is presently in possession of inchoate powers under all of the Reconstruction Amendments. Barring a reversal of these decisions, which seems unlikely at this time, Congress has already acquired substantial new powers under the enforcement clauses at the expense of the states. How far Congress will be permitted to extend its powers in this direction and the extent to which the Court will permit Congress to define both the substantive content of the amendments and Congress' powers under them are the principal questions that remain unanswered.

Nevertheless, many students of the Constitution, particularly those who have worked their way through the farrago of opinions (*i.e.*, *Katzenbach* I, II and *Jones*), are in agreement that these decisions and their progeny have produced a constitutional thicket of tangled precedents and conflicting interpretations that make it almost impossible to speak with any degree of confidence or certainty about the scope and meaning of Congressional power under the enforcement clauses of the Reconstruction Amendments. *Oregon v. Mitchell*, for example, which offers five different interpretations of the constitutionality of the Voting Rights Act Amendments of 1970, has been described by one commentator as a "constitutional law disaster area."[201]

In view of these difficulties, as well as the perennial problems associated with the interpretation of the Reconstruction Amendments, one is astonished to find that no one—not a single member of the Court or any of the commentators—has inquired about the original intent of those who drafted the enforcement clauses. Congressional debates and legislative interpretations are not always completely reliable sources of understanding, of course, owing to the nature of the political process and the constitutional insufficiency of many participants. But a study of such debates, from the perspective of what was said and what was not said, can often clarify the meaning of a word or clause, thereby facilitating the task of judicial construction.

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[198] *Id.* at 355.

[199] 384 U.S. 641 (1966).

[200] 392 U.S. 409 (1968).

[201] Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 609 (1975).

The enforcement clauses were only casually debated when the Reconstruction Amendments were proposed and adopted.[202] In fact, the meaning and purpose of the enforcement powers of Congress under the amendments were not subjected to a searching analysis until 1871, when Congress considered the Ku Klux Klan Act. The Ku Klux Klan Act was, to be sure, "the most extensive Congressional attempt during reconstruction to prevent racial and political crimes of violence pursuant to the fifth section of the fourteenth amendment."[203] These debates, which consumed nearly the entire first session of the Forty-second Congress, offer the most fruitful source of understanding regarding Congress' intended role in guaranteeing the protection of civil rights. Most of the Senators and Congressmen who actively participated in the debates on the Ku Klux Klan Act had also taken part in the drafting of the Reconstruction Amendments. These spokesmen addressed their remarks to all three amendments, weighed their words carefully, and were conscious of the fact that they were making legislative and constitutional history.

"I hope you gentlemen will bear in mind," said one legislator, "that this debate, in which so many have taken part, will become historical, as the earliest legislative construction given to this clause [section 5] of the amendment."[204] He went on to declare that "not only the words which we have put into law, but what shall be said here in the way of defining and interpreting the meaning of the clause, may go far to settle its interpretation and its value to the country."[205] These were the words of the Republican Representative from Ohio, James A. Garfield, who would later serve as the twentieth President of the United States. First elected to the Thirty-eighth Congress, in 1863, he was a staunch supporter of the Reconstruction Amendments. As Harris correctly observes, Garfield's perceptive address on the enforcement powers of Congress under the fourteenth amendment was "the most significant speech of the debate. . . ."[206]

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[202] One of the few studies on this subject is R. HARRIS, THE QUEST FOR EQUALITY (1960), which deals in part with the debates on section 5 of the fourteenth amendment at the time of adoption. As Harris notes,

> it is difficult to ascertain from the debates the specific purposes of the first section coupled with the fifth. The greater portions of the debates over the submission of the Fourteenth Amendment centered about the representation and suffrage provisions in Section 2 and the device for disfranchising former Confederates in Section 3.

Id. at 35.

[203] Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS L.J. 331, 331-32 (1967).

[204] CONG. GLOBE, 42d Cong., 1st Sess. app. 150 (1871) [hereinafter cited as GLOBE].

Although a full and complete analysis of the House and Senate debates on the Ku Klux Klan Act is beyond the scope of this paper, it is nevertheless possible to pinpoint the principal issues, and distill the general themes of Congressional power presented by the participants. Garfield's hour long speech on April 4, 1871, is especially significant in a number of ways. First, this speech served as a focal point of discussion in the House of Representatives, where the issue of enforcement was more extensively debated. Senate debate on the Ku Klux Klan bill was not as thorough, owing to the distracting influence of John Sherman's resolution calling for a bill to suppress disorders in the South.[207]

Second, Garfield was one of the most informed members of the House on the subject. Not only had he personally taken a part in the framing and adoption of the fourteenth amendment, but he had also studied carefully the debates in Congress and the constitutional issues that had arisen under the Reconstruction Amendments. The introductory part of Garfield's well-prepared address, amply supported by references to earlier debates, Supreme Court cases, and the works of such eminent authorities as Madison, Kent and Story, covered both the constitutional history of civil rights litigation before the adoption of the Reconstruction Amendments and the legislative history since the introduction of the Civil Rights Act of 1866. Quoting frequently from the debates on the consideration of the fourteenth amendment, Garfield led his colleagues, step by step, through the process of adoption in an effort to determine the intended and proper relationship between the first and fifth sections of the fourteenth amendment. He also invited the comments of his colleagues concerning the accuracy of his interpretations as he proceeded toward his conclusion that the Ku Klux Klan Act, as introduced, was unconstitutional.

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[205] *Id.*

[206] R. HARRIS, *supra* note 202, at 47.

[207] *Id.* at 49.

Third, a number of key legislators who had also participated in the drafting of the fourteenth amendment were present at the time Garfield delivered this speech, including the confused and contentious author of section 1 of the fourteenth amendment, Representative John Bingham of Ohio, and Representative Samuel Shellabarger, another Ohio Republican and the sponsor of the Ku Klux Klan bill. Significantly, Bingham was the only member of the House who took issue with any of the points raised by Garfield. Moreover, not one member spoke in support of Bingham, suggesting that Bingham's views on section 5 may not have been representative of a very large segment of opinion in the House.

Garfield began by extolling the virtues of local self-government, correctly pointing out "that before the adoption of the last three amendments it was the settled interpretation of the Constitution that the protection of the life and property of private citizens within the States belonged to the State governments exclusively."[208] This principle could be traced back to the *Federalist 45*,[209] which Bingham had quoted approvingly, Garfield noted, when the fourteenth amendment was under consideration.[210] When the Civil Rights Act of 1866 was debated, Garfield continued, Bingham repeatedly endorsed this principle, as did Shellabarger, who assured his colleagues that the Civil Rights Act of 1866 did not "reach mere private wrongs, but only those done under color of State authority. . . . It meant, therefore, not to usurp the powers of the States to punish offenses generally against the rights of citizens in the several States. . . ."[211]

To what extent did the Reconstruction Amendments alter the states' exclusive control over civil liberties? Garfield's answer reflected the widespread uncertainty among the members as to the precise effect of the new amendments on the powers of Congress. Garfield could only say that the Reconstruction Amendments had "modified the Constitution," and that "[t]hey have to some extent enlarged the functions of Congress and, within prescribed limits, have extended its jurisdiction within the States."[212] Focusing on section 1 of the fourteenth amendment, Garfield reminded his colleagues that Bingham's original proposal of January 12, 1866, which the House rejected and the Senate never debated at all,[213] provided that "Congress shall have power to make all laws necessary and proper to secure to all persons in every State within the Union equal protection in their rights of life, liberty, and property."[214] Had this first draft been adopted, said Garfield, it would have brought about a "radical change in the Constitution" by empowering "Congress to legislate directly upon the citizens of all the States in regard to their rights of life, liberty, and property."[215] In effect, Bingham's proposal would have nullified *Barron v. Baltimore*[216] and abolished the primary jurisdiction of the States over civil liberties. Garfield's point—a highly significant one—was abundantly clear: Congress' rejection of Bingham's original proposal in favor of the more restrictive language of section 1, which was a prohibition against the states rather than a grant of power to Congress, indicated that the framers intended to limit the scope of Congressional power under the fourteenth amendment by the federal principle, and to carve out an exception to the principle in *Barron*, not to overturn that principle. Comparing Bingham's rejected proposal with the first and fifth sections of the amendment as adopted, Garfield noted that the latter "exerts its force directly upon the *States*, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations."[217] The theory of Congressional power which was rejected with Bingham's proposal, on the other hand,

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[208] GLOBE, *supra* note 204, at app. 150.

[209] "The powers reserved to the several States," said Madison, the author of this essay, "will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people. . . ." *Id.*

[210] *Id.*

[211] *Id.* (citation omitted). Garfield also quoted Representative Delano (R.-Ohio), who in the same debate remarked that the Civil Rights Act of 1866 "was never designed to take away from the States the right of controlling their citizens in respect to property, liberty and life." *Id.* at app. 150.

> would have brought the power of Congress to bear directly upon the *citizens*, and contained a clear grant of power to Congress to legislate directly for the protection of life, liberty and property within the States. The first limited but did not oust the jurisdic-

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[212] *Id.* at app. 150.

[213] *Id.* at app. 151. Garfield had stated that Bingham's measure was "recommitted" to the Joint Committee of Fifteen on Reconstruction, to which Bingham replied that Garfield was "mistaken" because it had merely been postponed. Technically, Bingham was correct, Garfield agreed, but there was no doubt in anyone's mind that Bingham's original proposal "could not command a two-thirds vote of Congress, and for that reason the proposition was virtually withdrawn. Its consideration was postponed February 28 by a vote of 110 to 37." *Id.*

[214] *Id.* at app. 150.

[215] *Id.* at app. 151.

[216] 32 U.S. (7 Pet.) 243 (1833).

[217] GLOBE, *supra* note 204, at app. 151 (emphasis added).

> tion of the State over these subjects. The second gave Congress plenary power to cover the whole subject with its jurisdiction, and, as it seems to me, to the exclusion of the State authorities.[218]

This understanding was further supported, continued Garfield, by the late Radical Republican from Pennsylvania, Thad Stevens, the Chairman of the Joint Committee on Reconstruction in 1866 who reported the amendment in its final form. Stevens complained at the time, noted Garfield, that the amendment "'came far short of what he wished.'"[219] Interrupting Garfield at this point, Bingham rose to object, erroneously asserting that "[t]he remark of Mr. Stevens had no relation whatever to the provision. . . ."[220] But Garfield had all of the documents at hand. He quickly responded by quoting Stevens at length, with the admonishment that Bingham could "make but he cannot unmake history. I not only heard the whole debate at the time, but I have lately read over, with scrupulous care, every word of it recorded in the Globe."[221] Informing members that the wording of the fourteenth amendment was the result of a compromise worked out in the Joint Committee, Stevens had stated: "'The proposition is not all that the Committee desired. It falls far short of my hopes. . . . [T]he Constitution limits only the action of Congress, and it is not a limitation on the States. This amendment supplies [corrects?] that defect and allows Congress to correct the *unjust legislation of the States*. . .'"[222] Although Garfield did not elaborate further on the point, implicit in Stevens' statement to the members of the House was the recognition of a state action requirement in the amendment, and the grudging acceptance of the federal principle. According to Stevens, the power of Congress under the fourteenth amendment was not primary but corrective, and the object of Congressional legislation was not private discrimination but "the unjust legislation of the States."

Stevens' interpretation of section 1 of the amendment, continued Garfield, "was the one followed by almost every Republican who spoke on the measure. It was throughout the debate, with scarcely an exception, spoken of as a limitation of the power of the States *to legislate unequally for the protection of life and property*."[223] Indeed, Representation John Farnsworth of Illinois, a prominent figure in the debates, had "said that the first section might as well be reduced to these words: 'No State shall deny to any person within its jurisdiction the equal protection of the laws. . . .' "[224]

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[218] *Id.* (emphasis added).

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.* (emphasis added). Garfield could find only two House members, Shankling of Kentucky and Rogers of New Jersey (both Democrats opposed to the amendment)

Thus, Garfield understood that the dominant theme of the amendment was the equal protection of the laws and not due process or the privileges and immunities of citizenship. This view, it should be noted, is fairly consistent with Harris' reading of the debates on the adoption of the fourteenth amendment. "A common theme of the discussion by the amendment's supporters," Harris observes, "was the mutual interdependence of the privileges and immunities, due process, and equal protection clauses, in contrast to the later practice of constitutional lawyers and historians of regarding the clauses as separate and independent. To Bingham, Jacob Howard and their cohorts . . . equality was an essential part of liberty."[225] This interpretation of section 1, if correct, would, of course, narrow considerably further the scope of Congress' power to enforce the amendment as well as the scope of judicial review, since federal intervention into the affairs of the states respecting civil liberties would be limited to those instances where the states had legislated "unequally for the protection of life and liberty," and would not extend to cases where substantive rights had been curtailed or denied to all persons equally.

Turning to the enforcement clause itself, Garfield asserted that this clause empowered Congress to enforce the new guarantees in two ways. First, the enforcement clause gave Congress the power to enact legislation granting federal courts jurisdiction over disputes "where every law, ordinance, usage, or decree of any State in conflict with these provisions may be declared unconstitutional and void."[226] Believing that the courts rather than Congress would be the principle enforcer of the amendment, Garfield also expressed the view that "[t]his great remedy [of conferring jurisdiction] covers nearly all the ground that needs to be covered in time of peace."[227] Pointing to the Civil Rights Act of 1866 and the Enforcement Act of

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who thought section 1 placed "the protection of the fundamental rights of life and property directly in the control of Congress," and their assaults against the amendment "were general and sweeping charges, not sustained even by specific statement." *Id.*

[224] *Id.* The Due Process Clause, said Garfield, meant simply that each state was required to provide "an impartial trial according to the laws of the land." *Id.* at app. 153.

[225] R. HARRIS, *supra* note 202, at 35-36.

[226] GLOBE, *supra* note 204, at app. 153.

[227] *Id.*

1870, Garfield further noted that "this ground has already been covered, to a great extent, by the legislation of Congress."[228]

Secondly, Congress had the power to enact legislation "for the punishment of all persons, official or private, who shall invade these rights, and who by violence, threats, or intimidation shall deprive any citizen of their fullest enjoyment. This is a part of that general power vested in Congress to punish the violators of its laws."[229] As for the outrages being perpetrated by the Ku Klux Klan, which were the concern of the legislation under consideration, Garfield had "no doubt of the power of Congress to provide for meeting this new danger, and to do so without trenching upon those great and beneficent powers of local self-government lodged in the States and with the people."[230]

Unfortunately, Garfield's interpretation of Congress' power of enforcement at this crucial point of his analysis was not entirely clear. Apparently, Garfield was distinguishing between the power of Congress to prohibit the states from interfering with the rights protected under the amendment, which rested on section 5, and the power of Congress to provide for the punishment of individuals who violated those rights, which was based on "that general power vested in Congress to punish the violators of its laws." A cursory reading of his statement that this general power authorized Congress to enact legislation "for the punishment of all persons, official or private" suggests that Garfield may also have believed that Congress had the power to punish ordinary offenses by one individual against another. As will become evident from his objections to the second section of the proposed Ku Klux Klan Bill, however, and his position on the Cook-Shellabarger amendment to that section, Garfield apparently believed that Congress' authority to punish private offenses was limited to private acts of interference with state officials in their attempts to carry out constitutional duties imposed by federal statute.

Garfield had no quarrel with the first section of the Ku Klux Klan bill, which provided that any person who, under the color of a state law, deprived another of his rights under the Constitution, would be liable for an action of redress in the federal courts. "This," he asserted, "is a wise and salutary provision, and plainly within the power of Congress."[231] Indeed, said Garfield, Congress was even empowered to remedy injustice in those instances "where the laws are just and equal on their face, yet by a systematic maladministration of them, or neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them."[232]

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[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Id.*

But the second section of the bill, which a number of Republicans and Democrats had vigorously attacked in earlier debates,[233] presented a serious difficulty for Garfield. This second section was not directed at state action, but instead, provided civil and criminal penalties for such private conspiratorial acts as "murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny" that were committed "in violation of the rights, privileges or immunities of any person, to which he is entitled under the Constitution and laws of the United States."[234] Accordingly, Garfield argued that this section of the bill needed to be amended in such a way that it would "employ no terms which assert the power of Congress to take jurisdiction of the subject *until such denial* [of equal protection] be clearly made, and [would] not in any way assume the original jurisdiction of the rights of private persons and of property within the States. . . ."[235]

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[232] *Id.*

[233] In a major address on the scope of Congress' enforcement power, the Illinois Republican John Farnsworth denounced the second section as an unconstitutional usurpation of state authority. Quoting from the debates on the adoption of the fourteenth amendment, Farnsworth cited a number of Senators and Congressmen, including Thad Stevens, for the proposition that the amendment never "gave any power to Congress to legislation except to correct this unjust legislation of the States." *Id.* at app. 116. In essence, Farnsworth noted, the second section of the Ku Klux Klan bill simply punished murder and other crimes in derogation of state criminal jurisdiction. *See also* Representative Burchard's analysis in note 192, *supra*. In reply to Shellabarger's assertion that it only punished conspiracies to violate constitutional rights, Farnsworth observed that the inclusion of conspiracy did not correct the problem, since if Congress could punish a conspiracy it would also punish the same act done individually. GLOBE, *supra* note 204, at app. 113. Garfield, who was on the floor at the time Farnsworth and Shellabarger were engaged in this colloquy over the constitutionality of the second section, spoke up in support of Farnsworth, stating that there were only two members of the House in 1866, Shankland and Rogers, who thought that Congress had the authority that was now being claimed under the second section of the Ku Klux Klan bill. GLOBE, *supra* note 204, at app. 116.

Farnsworth was a veteran of the House. He had served as a Union general during the War and had avidly supported the fourteenth amendment. In a remarkable confession, he urged the members to exercise constitutional restraint, now that the war was over:

> I have given votes and done things during my twelve years service in the House of Representatives which I cannot defend. . . . I know we have done things during the war and during the process of reconstruction to save the public which could not be defended if done in peace. . . . We passed laws, Mr. Speaker, and the country knows it, which we did not like to go to the Supreme Court for adjudication. And I am telling no tales out of school. . . . Sir, we have done some things under the necessity of the case . . . which may be a little beyond the verge of the Constitutional power possessed by Congress in time of peace. But, sir, this is not the time to overstep those bounds.

GLOBE, *supra* note 204, at app. 116.

Likewise, Garfield believed that the third section of the bill was in need of repair because it seemed to propose that citizens be punished for violating state laws. "If this be the meaning of the provision," said Garfield, "then whenever any person violates a State law the United States may assume jurisdiction of his offense. This would virtually abolish the administration of justice under State law."[236] Garfield assured his colleagues that if these changes in the second and third sections of the bill were made, he would withdraw his objections to the bill and give it his support.

Representative Shellabarger, in response to Garfield's lengthy address, attempted to summarize Garfield's position as follows:

> I understand that the effect of what he [Garfield] says is, that as the first section of the fourteenth amendment to the Constitution is a negation upon the power of the States, and that as the fifth section of that amendment only authorizes Congress to enforce the provisions thereof, therefore Congress has no power by direct legislation to secure the privileges and immunities of citizenship, because the provision in each section is in the form of a mere negation.[237]

While this short summary was an essentially accurate description of Garfield's interpretation, Shellabarger merely touched on one aspect of it. In Garfield's mind, the overarching principle structuring the enforcement power of Congress under the fourteenth amendment was federalism. His assumption—an appealing one—was that the framers of the amendments, among which he included himself, had never intended to uproot the basic design of the Constitution by transferring primary control over civil liberties from the states to the national government.

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[234] GLOBE, *supra* note 204, at app. 113.

[235] *Id.* at app. 153.

[236] *Id.* at app. 154.

[237] *Id.* at app. 153. Shellabarger did not explain the nature of his disagreement with Garfield on this point, if any, but he wondered how Garfield could justify his vote on recently enacted legislation under the fifteenth amendment which declared "who shall vote at township and every other election," and then "punishes the man who deprives anyone of the right to vote, which he gets under Federal law, and in contravention of the constitutions of one half of the States," if Congress could not secure the right to vote by direct legislation. *Id.* at app. 154. Garfield replied that "[i]f the case stands in all respects exactly as my colleague [Shellabarger] puts it, it might push me to the conclusion that some of the provisions of the enforcement act are unconstitutional." But Garfield did not accept either the premise or the conclusion because Congress' power to regulate the time, place and manner of elections "carried with it the whole question of suffrage." *Id.*

Garfield found support for this assumption in Congress' rejection of Bingham's original draft, which would have conferred direct authority on Congress to define the substance of due process and equal protection, and in the wording of section 1, which gave Congress only a narrow power to enforce a prohibition. Congress' enforcement power was necessarily corrective in nature, therefore, since Congress could not act "until such denial of equal protection be clearly made," that is, until the states had denied the guarantees of the amendment. This approach would seem to require some sort of prior determination that such a denial had occurred before Congress could step in and remedy the defect. Whether Garfield had a judicial determination in mind is not certain, although he did indicate in explaining his opposition to the Ku Klux Klan Act that "Congress . . . [may not] take jurisdiction of the subject until such denial be clearly made."[238]

Finally, on the question of state action, Garfield took the position that Congress' enforcement power was limited to remedying defects in state laws, "a systematic maladministration of them, or a neglect or refusal to enforce their provisions."[239] Did this rule out the possibility of Congressional intervention in the absence of state laws, where the states had simply failed to pass any law and when there were no state statutory provisions to enforce in the first place? This limitation on the power of Congress would seem to be Garfield's understanding, although once again his remarks are not free of uncertainty. Still, Garfield did not doubt that Congress lacked the power under the fourteenth amendment to prescribe punishments for persons who violated state laws. Punitive measures against those who violated federal laws were appropriate, however, under the general powers of the federal government.

But Garfield, as well as nearly all the other Republicans in the House, also believed that the reach of Congressional enforcement power did not extend to offenses committed by one private individual against another.[240] Confronting this reality, Shellabarger, the sponsor of the Ku Klux Klan bill, subsequently amended the controversial second section of his proposal, upon the suggestion of Representative Burton Cook, an Illinois Republican lawyer. As modified, section 2 of the bill was restricted to conspiracies to deprive any person of the equal protection of the laws or equal privileges and immunities under the laws, or for the purpose of preventing state authorities from securing equal protection to all persons or injuring them for enforcing equal protection.[241]

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[238] *Id.*

[239] *Id.*

In explaining the constitutional theory behind the Cook-Shellabarger amendment, Cook declared that a

> combination of men by force and intimidation, or threat to prevent the Governor of a State . . . [from securing aid] to protect the rights of all citizens alike, or to induce the Legislature of a State by unlawful means to deprive citizens of the equal protection of the laws, or to induce the courts to deny citizens the equal protection of the laws . . . is the offense against the Constitution of the United States, and may be defined and punished by national law. And that, sir, is the distinct principle upon which this bill is founded.[242]

In brief, the Cook-Shellabarger amendment, as Alfred Avins has noted in his detailed analysis of the debates on the Ku Klux Klan Act concerning the issue of state action, "punished only conspiracies to obstruct state officials in performing their constitutional duty of affording all persons equal protection. It did not punish conspiracies to commit crimes against individuals, even if such crimes were motivated by a desire to deprive them of equal protection."[243] The Cook-Shellabarger amendment was adopted along with a few additional amendments of lesser significance, and the bill passed the House on a party-line vote of 118 to 91, with such critics of the first draft as Farnsworth and Garfield voting in favor of the bill.[244]

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[240] Representative Horatio Burchard, an Illinois Republican lawyer, spoke for most of his House colleagues when he stated that Shellabarger's first draft of the second section of the Ku Klux Klan Bill was an unconstitutional invasion of exclusive state criminal jurisdiction. On the other hand,

> [w]hat more appropriate legislation for enforcing a constitutional prohibition upon a State than to compel State officers to observe it? Its violations by the State can only be consummated through the officers by whom it acts. May it not then equally punish the illegal attempts of private individuals to prevent the performance of official duties in the manner required by the Constitution and laws of the United States?

Id. at app. 314. *See* the remarks of the Republican from Vermont, Representative Luke Poland, who was a member of the Senate in 1866 and a supporter of the fourteenth amendment. *Id.* at app. 514. *See also* the statement of Republican Senator Lyman Trumbull of Illinois, the veteran Chairman of the Senate Judiciary Committee, who avowed that he was "not willing to undertake to enter the States for the purpose of punishing individual offenses against their authority committed by one citizen against another." *Id.* at app. 577-78.

[241] *Id.* at app. 477-78.

[242] *Id.* at app. 486.

Senator Allen Thurman, an Ohio Democrat who had opposed the bill, proved to be right, however, that the second section of the Act was too vaguely worded. In *United States v. Harris*,[245] the Supreme Court declared that a section of revised statutes derived from the second section of the Ku Klux Klan Act was unconstitutional. "As, therefore, the section of the law under consideration is directed exclusively against the action of private persons," said the Court, "without reference to the laws of the State or their administration by her officers, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution."[246] In other words, the Court, apparently unaware of the intent of the Act, invalidated section 2 precisely on the grounds Garfield and others had criticized Shellabarger's first draft. "[A]lthough the theory ultimately adopted was that the violence would have to direct its force against a public official to deter him or prevent him from affording protection, the statutory language did not make this clear, but instead proscribed conspiracies to deny protection generally."[247] Thus, as Avins astutely observes, "[t]he anti-Klan statute was not a Congressional excursion into unconstitutional territory, but was merely the victim of poor legislative drafting."[248]

In the final analysis, poor draftsmanship may also explain the endless confusion and controversy that have traditionally accompanied the enforcement clauses of the Reconstruction Amendments. That the members of the Reconstruction Congresses and the Supreme Court have expressed so many divergent points of view on the enforcement powers of Congress suggests the presence of a fundamental flaw in the design. In reading over the debates on the Ku Klux Klan Act, for example, one senses a feeling of frustration among the members of Congress, many of whom participated in the drafting of the amendments but seem unable to articulate in a clear and precise manner Congress' role under them. At least three separate and distinct theories of congressional power were defended by the members of the Forty-second Congress,[249] and even a skilled lawyer such as James A. Garfield, who obviously studied the issue with great care, experienced difficulty in weaving the principle of congressional enforcement into the fabric of the Constitution.

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[243] Avins, *supra* note 203, at 353.

[244] GLOBE, *supra* note 204, at app. 522. The vote for final passage in the Senate was also based on party alignment: 36 to 13. *Id.* at app. 831.

[245] 106 U.S. 629 (1882).

[246] *Id.* at 639-40.

[247] Avins, *supra* note 203, at 379.

[248] *Id.* Avins notes that in *United States v. Guest*, 383 U.S. 745 (1966),

> one opinion of Justices Clark, Black and Fortas, and another of Justices Brennan, Douglas and the Chief Justice, held that the federal government, under the Fifth section of the fourteenth amendment, could punish private conspiracies or private violence designed to interfere with the exercise of rights under the first section of the amendment, regardless of what state officials may or may not do. This is the precise theory which in 1871 was disavowed by every Republican who voted for the fourteenth amendment. . . . It is nothing more than the creation by Congress of a general criminal code, providing only that an intent is present to deprive a man of his fourteenth amendment rights.

Id. at 381.

Under the original Constitution, the powers of Congress are expressed as affirmative grants of power to carry out stated objectives. In general, these are powers which were delegated to Congress by the states. Most of them are enumerated in article I, section 8 of the Constitution. This section of the Constitution also authorized Congress to pass all laws which are necessary and proper to carry into execution both the enumerated powers in article I, section 8 "and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." These are the implied powers of Congress.

Article I, section 10, on the other hand, deals with powers that are denied to the states, and in effect declares that the states did not reserve certain specified powers such as the power to enter into a treaty, pass a bill of attainder, or impair the obligation of contracts. No implication has ever been seriously considered that these prohibitions against the states simultaneously conferred any power on Congress to define or enforce the prohibitions. In fact, the President has the power to make treaties and Congress itself is prohibited under article I, section 9 from passing a bill of attainder. Only the courts, therefore, may enforce the prohibitions against the states that are contained in article I, section 10.

Like article I, section 10, the fourteenth amendment is also a prohibition against the states; but unlike that article, the amendment empowers Congress to enforce the prohibition. In this respect, the fourteenth amendment represents a radical departure from the basic design of the Constitution, since the amendment authorizes Congress, concurrently with the courts, to enforce certain restrictions against the states. Thus, an inherent problem of separation of powers and conflict between the courts and Congress is built into the amendment, in that the fundamental power to enforce, which is not a legislative power, is conferred on the legislature. Indeed, the power to enforce the Constitution is actually an executive power, although the courts accomplish this same end indirectly through their power to interpret and apply constitutional provisions. In sum, the fourteenth amendment introduces an alien principle into the Constitution that is wholly inconsistent with the basic system of separation of powers upon which the Constitution is built.

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[249] R. HARRIS, *supra* note 202, at 45.

These difficulties become all the more perplexing when one considers the thirteenth and fifteenth amendments, which are prohibitions against the states and the national government. The fifteenth amendment, for example, declares that "[t]he right . . . to vote shall not be denied or abridged by the United States or by any State . . .," and then stipulates that Congress is empowered to enforce the prohibition. In other words, the amendment empowers Congress to enforce a prohibition against itself. No historical evidence exists to support the assumption that the framers of the fifteenth amendment intended for Congress to be the final interpreter of its own powers, in derogation of the principles of separation of powers and judicial review. The wording of the amendment, however, seems to invite such an interpretation.

In the *Civil Rights Cases*,[250] Justice Bradley attempted to resolve these incongruities by reverting to the basic principles of the Constitution. Bradley observed that:

> [where] Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, among the several States . . . Congress has power to pass laws for regulating the subjects specified in every detail. . . . But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular State legislation or State action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and

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[250] 109 U.S. 3 (1883).

> redress the operation of such prohibited State laws or proceedings of State officers."[251]

Lacking a general and hence an implied power under the Enforcement Clause of the fourteenth amendment, the application of the *McCulloch* test to acts of Congress to determine their legitimacy would seem to be an improper rule of measurement since the scope of the enforcement power is far more limited than that of a delegated power under article 1, section 8. But these distinctions offered by Justice Bradley in 1883 have not been repeated and seem to have been forgotten by the modern Court.

Early in the debates on the Ku Klux Klan Act, John Bingham, in his colloquy with Congressman Farnsworth concerning the significance of Congress' rejection of his first draft of section 1 of the fourteenth amendment, explained that he redesigned the amendment to place it in conformity with *Barron v. Baltimore*.[252] In re-examining the case of *Barron*, said Bingham,

> after my struggle in the House in February 1866 . . . I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: "Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution and have expressed that intention."[253]

Continuing, Bingham revealed that:

> Acting upon this suggestion I did imitate the framers of the original constitution. As they had said 'no State shall emit bills of credit, pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts,' imitating their example and imitating it to the letter, I prepared the provision of the first section of the fourteenth amendment as it stands. . . .[254]

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[251] *Id.* at 18. To illustrate this principle further, he noted that:

> The Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by State legislation might be countenanced and corrected: and this power was exercised [under section 25 of the Judiciary Act of 1789].

Id. at 12.

[252] 32 U.S. (7 Pet.) 243, 250 (1833).

[253] GLOBE, *supra* note 204, at app. 84 (citation omitted).

[254] *Id.*

According to Bingham, then, the fourteenth amendment was derived in part from article I, section 10 of the Constitution.

Bingham did not correctly "imitate" article I, section 10 and obviously misunderstood the constitutional principles he was endeavoring to apply, as well as the Court's holding in *Barron*. What Bingham bequeathed to the nation was not the sense of the Constitution but his own inimitable confusion. In light of these considerations, it behooves both Congress and the courts to confine the enforcement clauses of the Reconstruction Amendments to the general framework of the Constitution or more specifically the basic principles of federalism and separation of powers. We have no indication that the framers of these amendments intended to overthrow these principles, even though their choice of wording clearly invites such an interpretation.

Upon reflection, one must conclude that the theory of Congressional power enunciated by Garfield is directly contrary to that announced by the Court in *Katzenbach I* and *II*. If Garfield's interpretation is correct, then the Supreme Court has improperly expanded the scope of the enforcement power far beyond proper limits. According to Harris,

> Garfield's speech on the Ku Klux Klan Bill is most persuasive. He had supported the Civil Rights and Freedmen's Bureau bills and the proposal for the Fourteenth Amendment in the Thirty-Ninth Congress. He displayed, as did many other supporters of these proposals, a solicitude for preserving federalism in its essential features. His interpretation of the first and fifth sections is the only interpretation that is compatible with the maintenance of federalism and simultaneously gives meaning to the equal protection clause and the fifth section vesting power in Congress to enforce the Amendment.[255]

A number of Justices, particularly Brennan, have borrowed liberally from Harris' work and cited him often. That these Justices have ignored Garfield's key speech in particular and the debates on the Ku Klux Klan Act in general indicates a continuing lack of interest among the Justices in seeking out the original intent of the framers regarding the enforcement power of Congress. That these Justices have chosen to ignore Harris' contribution, while at the same time lifting neighboring conclusions from Harris' work—in one instance from the same page where Harris evaluates Garfield's speech—raise the presumption that they would not defer to that intent even if i was presented to the court.[256]

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[255] R. HARRIS, *supra* note 202, at 53. It should be noted, however, that Harris' interpretation of Garfield's address is partly incorrect in that he assumes Garfield and the Forty-second Congress accepted in principle the right of Congress to legislate against wholly private offenses of one person against another. *Id.* at 48, 56.

CONCLUSION

"[A] Senator rising to attack the constitutionality of the so-called Voting Rights Act finds himself in a veritable quandary. He does not know where to begin."[257] These words of Senator Herman Talmadge (D.-Ga.), in Senate debate more than fifteen years ago, reflect the general frustration of Congressional opponents of the Act when they confronted legislation which presented seemingly interminable constitutional violations. Since that time, the Supreme Court has added its own perceptible imprint, thereby compounding the problem of constitutional analysis. Resisting the temptation to examine every ostensible constitutional flaw and judicial embellishment, this essay has attempted merely to identify some of the more salient issues, principally within the context of legislative intent.

The basic argument against the Voting Rights Act, as originally enacted and presently interpreted, is that it departs frequently and substantially from established principles of federalism and separation of powers. This argument is essentially consistent with the position taken by Senator Sam Ervin (D.-N.C.), who led the Congressional attack against the Act when it was first proposed. The "overriding defect" of the bill, he charged, was "that it degrades certain States and subdivisions to the point where they are denied fundamental rights. . . ."[258] Ervin enumerated six major objections to the bill to demonstrate this proposition—and then proceeded to expound on countless other evils contained in the legislation. Arguing primarily from general principles rather than specific constitutional provisions, Ervin contended that the bill (1) was repugnant to the constitutional principle that the United States is a union of states with equal power and dignity, (2) improperly suspended literacy tests and sought to compel the designated states to change their electoral laws, (3) prostituted the juridical process by denying the states access to local federal courts and subjecting them to specially created rules of evidence and procedure, in contravention of due process, and (4) conferred "arbitrary and tyrannical power upon the Attorney General of the United States," thereby promoting rule of men and not of law.[259] Further, Ervin argued that the law was unnecessary because federal statutes already on the books were sufficient to secure registration and the right to vote. Turning finally to a specific prohibition in the Constitution, the Senator from North Carolina asserted that the Act punished certain states without a judicial trial, and was therefore a bill of attainder within the meaning of article I, section 9 of the Constitution. That the Act sought to punish states on the basis of past events also rendered it an ex post facto law.

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[256] In his oral argument before the Supreme Court in *Katzenbach II*, the embattled Alfred Avins, who also appeared as counsel in the *Mayer* case, declared that "it would be necessary for the Department of Justice to burn the Congressional Globe debates if they were to convince anybody that the original understanding was in accordance with this statute." Avins, *supra* note 178, at 381 n.249.

[257] II B. SCHWARTZ, *supra* note 27, at 1567.

[258] *Id.* at 1557.

Such was the warp and woof of the argument advanced against the Voting Rights Act by the Southern delegation.[260] In the days of Henry St. George Tucker, Alexander H. Stephens, and John C. Calhoun, when Southerners distinguished themselves as constitutional scholars, a better case might have been made. But Ervin stood almost alone; and although his constitutional critique was perceptive, it overlooked obvious defects and emphasized dubious points of law. Surprisingly, none of the Congressional opponents challenged the Act as an improper exercise of the enforcement power or contended that it was inconsistent with the original intent of those who drafted the Reconstruction Amendments. Particularly distracting was Senator Ervin's futile attempt to confer due process rights on the states, and his drumming insistence that the Act constituted a bill of attainder. This untenable theory, relied upon by other congressional opponents, was even repeated by counsel when they appeared before the Supreme Court, and it was not laid to rest until

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[259] *Id.* at 1558-59.

[260] Only a handful of senators and congressmen, all from the South, opposed that Act, and it passed both houses of Congress by overwhelming majorities: 79-18 in the Senate and 328-74 in the House. Senator Ervin was the only member of Congress who presented a case against the Act based on constitutional analysis. Senator Talmadge inveighed against the Act as an "immoral and vicious bill drawn for the punishment of carefully selected sovereign States." *Id.* at 1550. Senator A. Willis Robertson (D.-Va.) complained that the Voting Rights Act was reminiscent of "the time when Congress declared Virginia, the mother of States, to be incapable of self-government, and we were named Federal District No. 1, and Federal officials and carpetbaggers took charge of our States." *Id.* at 1543. In 1975, Senator James Allen (D.-Ala.) broadened Ervin's constitutional attack against the Act, arguing that it also violated the Guarantee Clause of article IV, section 4, that every state have a republican form of government, the ninth and tenth amendments, and the Full Faith and Credit Clause on the ground that the Act made it impossible for each state to give full faith and credit to the acts of other states. *1975 Senate Hearings, supra* note 32, at 32-37. Altogether, congressional opponents have alleged that more than ten principles or provisions of the Constitution are violated under the Act.

Chief Justice Warren dismissed it out of hand in *South Carolina v. Katzenbach*.[261]

Confronted by discriminatory legislation which subverted the inherent electoral powers of seven states, congressional opponents of the Voting Rights Act were seemingly at a loss for a constitutional argument. That a Congressional majority, backed by the President, would be so imperious as to single out a handful of states for repressive legislation was an outrage for which these opponents were unprepared; for not since the darkest hours of Radical Reconstruction had the South been subjected to such an arbitrary exercise of federal power. In vain, the opponents of the Act anxiously searched the Constitution for a clause that would protect their rights and interests. They cited sections of article I and article II for the proposition "that the States have the power to prescribe qualifications for voting,"[262] but could find nothing prohibiting discriminatory treatment of the states. The founding fathers, though mindful of sectional conflict and interstate rivalries, were reasonably satisfied that the system of representation established under the Constitution, which included equality in the Senate, was sufficient to prevent or at least discourage the sustained despotism of any single-minded faction, and accordingly wrote no explicit guarantee of equality among the states into the Constitution; nor had the framers of the Reconstruction Amendments granted any future protection to the states in anticipation of a recurrence of the abuses that the states of the Confederacy experienced under the Radical Republicans. Groping for a constitutional peg on which to hang their plea, the opponents of the Act rallied around the Bill of Attainder Clause apparently more out of desperation than certainty of their position. If the Bill of Attainder Clause protected individuals against punishment without a trial, why shouldn't it also protect the states?

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[261] 383 U.S. at 324. The Bill of Attainder Clause, noted Warren, protects individuals and groups, not states. Alexander Bickel thought Ervin's argument was "weird." Bickel, *The Voting Rights Cases*, SUP. CT. REV. 87 (1966). Much of Ervin's presentation, it has been said, "was amazingly weak from a constitutional view. . . . thus, his consistent attacks on the bill as an ex post facto law and bill of attainder would scarcely be made even by a law school neophyte—so contrary is it to all the law on the subject." II B. SCHWARTZ, *supra* note 27, at 1470.

[262] In a colloquy on the Senate floor, Senators Ervin and Talmadge referred to section 2 of article I and the seventeenth amendment which provide that the states shall determine the qualifications of those who vote in elections for members of Congress, and article II, which states that presidential and vice presidential electors shall be selected in such a manner as the legislatures of the states shall direct. *Id.* at 1568.

Though never developed in their bill of particulars, a more persuasive argument might have been made had the opponents of the Act rested their case on the doctrine of equal footing. Since 1796, when Tennessee was admitted to the Union as the third new state, admission acts have uniformly declared that the state in question shall be admitted "on an equal footing with the original States." Indeed, "every new State," as a general rule, "is entitled to exercise all the powers of government which belong to the original States of the Union."[263] This principle is so firmly established in American constitutional law that it has long ceased to be debatable.[264]

"Again and again, in adjudicating the rights and duties of States admitted after 1789," notes Corwin, "the Supreme Court has referred to the condition of equality as if it were an inherent attribute of the Federal Union."[265] Thus in *Coyle v. Smith*,[266] the leading case on the subject, the Court invalidated a restriction that Congress had imposed upon Oklahoma as a condition of the state's admission to the Union. Insisting that Oklahoma should locate its capital in Guthrie, Congress required in its enabling act that the new state irrevocably agree not move the capital to a new location before 1913. The people of Oklahoma ratified this agreement and Oklahoma was admitted to the Union; but in 1910 they promptly initiated a bill, which the voters approved, providing that the capital should be moved to Oklahoma City. In sustaining the right of a state to place its capital where it chooses, the Court enunciated the principle of state equality, declaring that the admission power of Congress is limited by the principle of equal sovereignty among the states. The power of Congress in question, said the Court,

> is to admit "new States into *this* Union." "This Union" was and

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[263] E. CORWIN, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 844 (1973).

[264] Disdainful of the notion that the new Western states should enjoy the rights and prerogatives of those already established, a majority of the states at the Constitutional Convention voted to delete the requirement of equality. *See* II M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 454-55 (1937). Earlier, however, Georgia and Virginia had ceded vast territories to the national government on the condition that new states formed from such lands be admitted as equal partners in the Union. This principle was extended to states created out of territory purchased from a foreign government with the admission of Louisiana in 1812. *See* Pollard v. Hagan, 44 U.S. (3 How.) 212, 221 (1845).

[265] E. CORWIN, *supra* note 262, at 843. Said the Court in *Escanaba Co. v. Chicago*, 107 U.S. 678, 689 (1883): "Equality of constitutional right and power is the condition of all the States of the Union, old and new."

[266] 221 U.S. 559 (1911).

> is a union of States equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power. . . .[267]

Thus the power of Congress to admit new states into the Union under article IV, section 3 is limited not only by the requirement that the new state not be formed within the jurisdiction of another state, or by joining two or more states or parts thereof, without the consent of the state legislatures involved, but also by the unwritten principle inherent in the federal system of the constitutional equality of the states. Without this equality, the Union is reduced to a unitary state, held together by force rather than mutual consent, with the stronger, more populous states suppressing the weaker. "[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."[268]

Opponents of the Voting Rights Act finally put together a case against the Act using the equal footing doctrine when *South Carolina v. Katzenbach* was litigated, but the Court summarily dismissed the argument, asserting that it "applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."[269] The issue has not been raised in subsequent decisions under the Act. While the holding in *Coyle v. Smith* was limited to the question of whether Congress had the authority to impose unequal conditions upon a state at the time of admission, a careful reading of the opinion suggests that the theory of federalism upon which the Court based its decision extends not merely to the states' rights to constitutional equality at the time of entry into the Union, but forever. If equality is required for admission, then *a fortiori* equality is required after admission, at the more meaningful period of full membership in the family of states. To be sure, the doctrine of equal footing is meaningless if Congress, having once admitted a state into the Union on the basis of equality, is thereafter free to deny that equality after the state has become a permanent member. The Court's position in *South Carolina v. Kat-*

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[267] *Id.* at 567.

[268] *Id.* at 580.

[269] 383 U.S. at 328-29 (citing Coyle v. Smith, 221 U.S. 559 (1911)).

zenbach leads to the peculiar result that a state has a stronger claim to equal rights when it is a territory seeking admission as a state than when it has already acquired statehood. Reason dictates that Congress has no greater authority today to strip an individual state of its electoral powers than it does to compel Oklahoma to move its capital back to Guthrie.

The South's constitutional claim of the right of the states to secede from the Union was finally answered by the Supreme Court in the landmark decision of *Texas v. White*.[270] In that case, the Court rejected the doctrine of secession, holding that the State of Texas never left the Union. "[T]he Constitution, *in all its provisions*, looks to an indestructible Union composed of indestructible States."[271] Thus the theory of the nature of the Union adopted by the Court in the *Coyle* and *White* cases is incompatible with the position taken by the Court in *South Carolina v. Katzenbach*, for if the states are equal at the time of admission, and thereafter acquire the attribute of "indestructibility" in an "indestructible Union," they are necessarily equal in all respects under the Constitution. The power to discriminate against a state or group of states is the power to destroy—to destroy that which is supposedly "indestructible." The argument for the constitutional equality among the states is thus not only an argument for states' rights but also for the preservation of the Union.

This serious, if not fatal, flaw might be corrected, of course, if sections 4 and 5 of the Act were to be extended to all the states. Corrective amendments to this effect have been under consideration since the Act was drafted, and will surely reappear in the Ninety-seventh Congress now that the question of whether to re-extend the Act is once again on the legislative agenda. While the extension of coverage to all the states would cure one constitutional defect, it would surely open the door to new problems. From an administrative standpoint, it would place an onerous burden on the Justice Department, which is already at the breaking point in overseeing compliance and processing applications under section 5. Moreover, such a sweeping extension would bring about a radical transformation of American politics throughout the nation, spreading the *City of Rome* doctrine and the right of minority groups to hold office to the four corners of the continent. Full extension of the Act would pose a grave threat to American democracy and the system of majority rule as we know it, by laying the foundation for proportional representation of racial and ethnic minorities, with all its attendant dangers in terms of political disruption, racial confrontation, and polarization of interests. That the "melting pot" substructure of the American political tradition has already been dangerously weakened by current public policies encouraging racial and ethnic separatism is a factor that should be carefully weighed in any reconsideration of the Act's coverage formula.[272] At bottom, the Voting Rights Act rests upon the presumption that the targeted states and their political subdivisions are perpetually discriminating against voters, a presumption that no longer has much validity. These states, as Senator James Allen pointed out in 1975, "have long since met and exceeded fifty percent voter registration and participation standards set out in section 4."[273] They have not administered a literacy test in more than 15 years.

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[270] 74 U.S. (7 Wall.) 700 (1869).

[271] *Id.* at 725 (emphasis added).

Barring repeal of the Act, numerous improvements might be made to alleviate its more deleterious constitutional consequences and discriminatory features. These improvements would include (1) outright repeal of sections 4 and 5, or at the very least modifications thereof to allow states or their political subdivisions to "bailout" as an incentive or reward; (2) transferring the burden of proof to the federal government; (3) revision of the coverage formula in recognition of the fact that voter participation and voter discrimination are not invariably interrelated;[274] (4) elimination of the "effects" test; (5) exemption of political subdivisions such as those of north Georgia where racial minorities constitute a small fraction of the population;[275]

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[272] In the Ninety-seventh Congress, 1st Session, Senator S.I. Hayakawa (R.-Calif.) and Representative Robert McClosky (R.-Calif.) have introduced S. 53 and H.R. 1407 to repeal the prohibitions against voting qualifications, tests and devices for language minorities, and the requirement that states and their political subdivisions make available registration and voting materials and voting assistance in languages other than English. See n.33, *supra*.

[273] *1975 Senate Hearings*, *supra* note 32, at 27.

[274] Despite the increase in primaries and easing of voter registration requirements, presidential elections in the 1970's revealed increasing apathy among the voters. In 1972 participation of the voting age population in presidential elections fell from 60.6 percent in 1968 to 55.6 percent, and dropped again in 1974. *See* K. PHILLIPS & P. BLACKMAN, ELECTORAL REFORM AND VOTER PARTICIPATION (1975). In the 1980 Presidential election, only 51 percent of the voting age population cast a vote. Bureau of the Census, Voting and Registration in Election of November, 1980, Advance Report (1981).

[275] One attorney in the Civil Rights Division of the Justice Department has suggested "that political subdivisions which have a relatively small racial minority, perhaps below five or ten percent . . . [should] be exempt from compliance with section 5." This change is appropriate because "the reasonable expectancy of fifteenth amendment violations is very slight where the minority group constitutes such a small percent-

and (6) the repeal of the congressional regulation on the jurisdiction of lower federal courts which grants exclusive jurisdiction to the District Court in the District of Columbia. Also worthy of consideration is the formulation of federal standards of literacy, which the states might adopt at their option. While changes such as these would not satisfy many constitutional objections to the Act, they might have the salutary effect of eliminating its more egregious and discriminatory provisions.

Frequently hailed as "the most successful piece of civil rights legislation ever enacted,"[276] the Voting Rights Act has also been candidly acknowledged to be "the most drastic civil rights statute ever enacted by Congress, going even beyond the far-reaching provisions of the Force Act of 1871, upon which it is in certain respects, modeled."[277] With only scattered protests, the Act has repeatedly received the blessings of Congress, the courts, and the offices of four Presidents. During the past fifteen years the Act has enjoyed such immense support as to be practically immune from searching analysis; and surprisingly few constitutional critics have surfaced to challenge the Supreme Court's expansive interpretation of its provisions. Except for the lonely dissents of Mr. Justice Black,[278] no member of the Court has contended that any section of the Act is unconstitutional. That the Voting Rights Act, one of the most far-reaching civil rights statutes ever enacted by Congress, has provoked so little controversy or constitutional debate in the literature of the law is a telling commentary on the influence of result-oriented jurisprudence and the concomitant decline of federalism and separation of powers. As a cross-current in the unremitting flow of praise, this essay subscribes to the minority view expressed by Senator Sam Ervin that the Voting Rights Act "is utterly repugnant to the basic principles upon which our system of justice rests."[279]

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age of the total population." Important to the Justice Department is the need for "balance . . . between this possibility and the onerous burden of compiling the multitude of documents, maps and census information which section 5 places on covered jurisdictions." Roman, *Section 5 of the Voting Rights Act: The Formulation of an Extraordinary Federal Remedy*, 22 AM. U.L. REV. 132 (1972).

[276] Nicholas Katzenbach, cited in *1975 Senate Hearings*, *supra* note 32, at 121. President Lyndon Johnson praised the Act as "one of the most monumental laws in the entire history of American freedom." 111 CONG. REC. 19649 (1965).

[277] II B. SCHWARTZ, *supra* note 27, at 1469. At least one high-ranking official of the Justice Department has conceded that "[s]ection 5 represents a substantial departure . . . from ordinary concepts of our federal system." Stanley Pottinger (Assistant Attorney General, Civil Rights Division), cited in *1975 Senate Hearings*, *supra* note 32, at 536.

[278] Allen v. State Bd. of Elections, 393 U.S. at 595 (1969); South Carolina v. Katzenbach, 383 U.S. at 355 (1966).

[279] II B. SCHWARTZ, *supra* note 27, at 1565.

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COVERED STATES AND JURISDICTIONS THAT HAVE "BAILED OUT" OR ATTEMPTED TO "BAIL OUT" OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED

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COVERED STATES AND JURISDICTIONS THAT HAVE "BAILED OUT" OR ATTEMPTED TO "BAIL OUT" OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED

I. COVERED JURISDICTIONS

Under the Voting Rights Act of 1965, as amended,[1] a covered jurisdiction is a state, or a county, parish, or town within a state that is not covered as a whole, that (1) used a test or device[2] on November 1, 1964, 1968, or 1972 as determined by the Attorney General and (2) had less than fifty percent of the persons of voting age registered as of November 1, 1964, 1968, or 1972 or had less than fifty percent of such persons voting in the presidential elections of 1964, 1968, and 1972 as determined by the Director of the Census.[3]

The jurisdictions that were brought under the Act in 1965 and early 1966 by this triggering formula were: Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, Virginia;[4] forty counties out of one hundred counties in North Carolina;[5] four counties out of fourteen counties in Arizona,[6] Honolulu County, Hawaii, and Elmore County, Idaho.[7]

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[1] Pub. L. No. 89-110, 79 Stat. 438 (1965) (codified at 42 U.S.C. § 1973 et seq.).

[2] For the definition of test or device, see 42 U.S.C. § 1973b(c) and 1973b(f)(3).

[3] 42 U.S.C. § 1973b(b).

[4] The coverage of the seven states in their entirety was published in 30 Fed. Reg. 9897 (1965).

[5] Notice of coverage for twenty-six North Carolina Counties (Anson, Bertie, Caswell, Chowan, Craven, Cumberland, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Hartford, Hoke, Lenoir, Nash, Northampton, Onslow, Pasquotank, Person, Pitt, Robeson, Scotland, Vance, Wayne and Wilson) was published in 30 Fed. Reg. (1965). Martin and Washington Counties were listed in 31 Fed. Reg. 19 (1966). Camden and Perquimans Counties were listed in 31 Fed. Reg. 3317 (1966).

[6] Apache County was listed in 30 Fed. Reg. 9897 (1965), Coconino and Navajo Counties were listed in 30 Fed. Reg. 14505 (1965). And Yuma County, Arizona was listed in 31 Fed. Reg. 982 (1966).

[7] Honolulu County, Hawaii and Elmore County, Idaho were listed in 30 Fed. Reg. 14505.

The Voting Rights Act Amendments of 1970[8] continued coverage of most of these jurisdictions and amended the trigger formula to include the 1968 presidential election as well as the 1964 presidential election which brought the following jurisdictions under the coverage of the Act: three counties in New York City (the boroughs of Manhattan, Brooklyn, and the Bronx); Campbell County, Wyoming; Monterey and Yuba Counties in California; five additional counties in Arizona (Cochise, Mohave, Pima, Pinal, and Santa Cruz); and some of the counties which had been exempted or had "bailed out" after their coverage in 1965 were recovered in 1970: Apache, Coconino, and Navajo Counties in Arizona, Elmore County, Idaho; and Election Districts 8, 11, 12, and 13 in Alaska.[9] In 1974 certain New England towns were found to have met the tests of the triggering formula of section 4(b) of the Act (42 U.S.C. § 1973b(b)).[10]

The Voting Rights Act Amendments of 1975[11] extended coverage of the Act for seven years and expanded the coverage of the Act by broadening the trigger mechanism so as to extend the preclearance protections to certain language minorities composed of Spanish-speaking Americans, American Indians, Asian-Americans, and Alaska natives.[12] Under the 1975 amendments, the areas in 1975 that were required to provide bilingual election materials and to submit for preclearance all election law changes under section 5 of the Act (42 U.S.C. § 1973c) and that would be subjected to federal election examiners under section 6 (42 U.S.C. § 1973d), were as follows:[13]

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[8] Pub. L. No. 91-285, 84 Stat. 314 (1970).

[9] 36 Fed. Reg. 5809 (1971).

[10] 39 Fed.Reg. 16912 (1974). Connecticut: the towns of Southbury, Groton, and Mansfield. New Hampshire: the towns of Rindge, Stewartstown, Stratford, Benton, Antrim, Boscawen, Newington, and Unity; Millsfield Township, and Pinkhams Grant. Maine: the towns of Limestone, Ludlow, Woodland, New Gloucester, Sullivan, Winter Harbor, Chelsea, Charleston, Waldo, Beddington, and Cutler; Caswell, Nashville, Reed, Somerville, Carroll, and Webster plantations, and the unorganized territory of Connor. Massachusetts: the towns of Bourne, Sandwich, Sunderland, Amherst, Belchertown, Ayer, Shirley, Wrentham, and Harvard.

[11] Pub. L. No. 94-73, 89 Stat. 400 (1975).

1. Spanish - heritage:

Arizona	(10 counties)
California	(6 counties)
Colorado	(1 county)
Florida	(6 counties)
New Mexico	(3 counties)
New York	(3 counties)
Texas	(the entire state)

2. American Indian:

Arizona	(4 counties)
Florida	(1 county)
New Mexico	(1 county)
North Carolina	(4 counties)
Oklahoma	(2 counties)
South Dakota	(2 counties)
Utah	(1 county)
Virginia	(1 county)

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[12] Section 4(f)(3) of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973b(f)(3)) defines "test or device," as these terms are used with respect to coverage determinations made on the basis of 1972 registration and voting figures, as the provision of English-only registration or voting materials or assistance in any state or political subdivision where the Director of the Census determines that more than five percent of the citizens of voting age are of a single language minority.

[13] 1975 Congressional Quarterly Almanac p.522 (1975). Note that these jurisdictions should be distinguished from certain other jurisdictions that are only required to provide bilingual election materials but would not be subjected to the preclearance or examiner remedies of sections 5 and 6 of the Voting Rights Act of 1965, as amended.

3. Alaskan Natives:

Alaska (the entire state)

4. Asian Americans:

Hawaii (1 county)

As of March 21, 1980,[14/] the following jurisdictions have been covered under the trigger formula of section 4(b) of the Act (42 U.S.C. § 1973b(b) and are subject to the preclearance requirement of section 5 of the Act: (42 U.S.C. § 1973c).

Alabama (statewide) (Nov. 1, 1964)
Alaska (statewide) (Nov. 1, 1972)
Arizona (statewide) (Nov. 1, 1972)
(The following Arizona counties were covered individually through the use of earlier dates.)
Apache County (Nov. 1, 1968)
Cochise County (Nov. 1, 1968)
Coconino County (Nov. 1, 1968)
Mohave County (Nov. 1, 1968)
Navajo County (Nov. 1, 1968)
Pima County (Nov. 1, 1968)
Pinal County (Nov. 1, 1968)
Santa Cruz County (Nov. 1, 1968)
Yuma County (Nov. 1, 1964)
California (the following counties only)
Kings County (Nov. 1, 1972)
Merced County (Nov. 1, 1972)
Monterey County (Nov. 1, 1968)
Yuba County (Nov. 1, 1968)
Colorado (the following county only)
El Paso (Nov. 1, 1972)
Connecticut (the following towns only)
Groton Town (Nov. 1, 1968)
Mansfield Town (Nov. 1, 1968)
Southbury Town (Nov. 1, 1968)
Florida (the following counties only)
Collier County (Nov. 1, 1972)
Hardee County (Nov. 1, 1972)
Hendry County (Nov. 1, 1972)
Hillsborough County (Nov. 1, 1972)
Monroe County (Nov. 1, 1972)
Georgia (statewide) (Nov. 1, 1964)
Hawaii (the following county only)
Honolulu County (Nov. 1, 1964)
Idaho (the following county only)
Elmore County (Nov. 1, 1968)
Louisiana (statewide) (Nov. 1, 1964)
Massachusetts (the following towns only)
Amherst Town (Nov. 1, 1968)
Ayer Town (Nov. 1, 1968)
Belchertown (Nov. 1, 1968)
Bourne Town (Nov. 1, 1968)
Harvard Town (Nov. 1, 1968)
Sandwich Town (Nov. 1, 1968)
Shirley Town (Nov. 1, 1968)
Sunderland Town (Nov. 1, 1968)
Wrentham Town (Nov. 1, 1968)
Michigan (the following townships only)
Buena Vista Township (Saginaw County) (Nov. 1, 1972)
Clyde Township (Allegan County) (Nov. 1, 1972)
Mississippi (statewide) (Nov. 1, 1964)
New Hampshire (the following political subdivisions only)
Antrim Town (Nov. 1, 1968)
Benton Town (Nov. 1, 1968)
Boscawen Town (Nov. 1, 1968)
Millsfield Township (Nov. 1, 1968)
Newington Town (Nov. 1, 1968)
Onslow County (Nov. 1, 1964)
Pasquotank County (Nov. 1, 1964)
Perquimans County (Nov. 1, 1964)
Person County (Nov. 1, 1964)
Pitt County (Nov. 1, 1964)
Robeson County (Nov. 1, 1964)
Rockingham County (Nov. 1, 1964)
Scotland County (Nov. 1, 1964)
Union County (Nov. 1, 1964)
Vance County (Nov. 1, 1964)
Washington County (Nov. 1, 1964)
Wayne County (Nov. 1, 1964)
Wilson County (Nov. 1, 1964)
South Carolina (statewide) (Nov. 1, 1964)
South Dakota (the following counties only)
Shannon County (Nov. 1, 1972)
Todd County (Nov. 1, 1972)
Texas (statewide) (Nov. 1, 1972)
Virginia (satewide) (Nov. 1, 1964)
Wyoming (the following county only)
Campbell County (Nov. 1, 1968)
Pinkhams Grant (Nov. 1, 1968)
Rindge Town (Nov. 1, 1968)
Stewartstown (Nov. 1, 1968)
Stratford Town (Nov. 1, 1968)
Unity Town (Nov. 1, 1968)
New York (the following counties only)
Bronx County (Nov. 1, 1968)
Kings County (Nov. 1, 1968)
New York County (Nov. 1, 1968)
North Carolina (the following counties only)
Anson County (Nov. 1, 1964)
Beaufort County (Nov. 1, 1964)
Bertie County (Nov. 1, 1964)
Bladen County (Nov. 1, 1964)
Camden County (Nov. 1, 1964)
Caswell County (Nov. 1, 1964)
Chowan County (Nov. 1, 1964)
Cleveland County (Nov. 1, 1964)
Graven County (Nov. 1, 1964)
Cumberland County (Nov. 1, 1964)
Edgecombe County (Nov. 1, 1964)
Franklin County (Nov. 1, 1964)
Gaston County (Nov. 1, 1964)
Gates County (Nov. 1, 1964)
Granville County (Nov. 1, 1964)
Greene County (Nov. 1, 1964)
Guilford County (Nov. 1, 1964)
Halifax County (Nov. 1, 1964)
Harnett County (Nov. 1, 1964)
Hertford County (Nov. 1, 1964)
Hoke County (Nov. 1, 1964)
Jackson County (Nov. 1, 1972)
Lee County (Nov. 1, 1964)
Lenoir County (Nov. 1, 1964)
Martin County (Nov. 1, 1964)
Nash County (Nov. 1, 1964)
Northampton County (Nov. 1, 1964)

[14/] 45 Fed. Reg. 18898 (1980).

II. COVERED JURISDICTIONS THAT HAVE "BAILED OUT" OR ATTEMPTED UNSUCCESSFULLY TO "BAIL OUT" OF THE ACT

Under section 4(a) of the Voting Rights Act, as amended (42 U.S.C. § 1973b(a), covered jurisdictions may exempt themselves from special coverage or "bail out" from the Act if they can persuade the District Court for the District of Columbia that they have not used a test or device in a discriminatory manner for five (since 1975, seventeen) years. Between 1965 and 1970 the following jurisdictions successfully sued to exempt themselves from coverage, and consent decrees allowing them to "bail out", were issued by the District Court for the District of Columbia: State of Alaska; Wake County, North Carolina; Elmore County, Idaho; and Apache, Navajo, and Coconino Counties, Arizona.[15]

Gaston County v. United States

However, Gaston County, North Carolina was unsuccessful in its exemption suit. Gaston County brought suit to exempt itself from coverage under the Voting Rights Act of 1965, alleging that the literacy test had not been used during the preceding five years for the purpose or with the effect of denying or abridging the right to vote on account of race or color. A three-judge District Court for the District of Columbia denied the relief requested and held that the County did not meet its burden of proving that its use of the literacy test, in the context of its historic maintenance of segregated and unequal schools, did not discriminatorily deprive Negroes of the right to vote.[16]

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[15] Alaska v. United States, Civil No. 101-66 (D.D.C. Aug. 17, 1966); Wake County v. United States, Civil No. 1198-66 (D.D.C. Jan. 23, 1967); Apache County v. United States, 256 F. Supp. 903 (D.D.C. 1966)--including Navajo and Coconino Counties, leaving Yuma County covered; and Elmore County v. United States, Civil No. 320-66 (D.D.C. Sept. 22, 1966).

[16] Gaston County v. United States, 288 F. Supp. 678, 687-690 (D.D.C. 1968).

On direct appeal to the United States Supreme Court, the lower court judgment was affirmed, and it was found that adult Negroes who had received inferior education were discriminatorily affected by the use of the literacy test despite any signs of progress in the impartial administration of the registration law and the equalization and integration of the County's school system.[17/]

The Voting Rights Act Amendments of 1970, by amending the trigger coverage formula of section 4(b), 42 U.S.C. § 1973b(b) to include the 1968 presidential election as well as the 1964 presidential election, recovered some of the jurisdictions that had been exempted: Apache, Coconino, and Navajo Counties in Arizona, Elmore County, Idaho, and Election Districts 8, 11, 12, and 13 in Alaska.[18/] In 1972 all of the election districts in Alaska were exempted.[19/] However, the 1975 Amendments to the Voting Rights Act recovered the entire State of Alaska because of the expansion of the trigger formula of section 4(b) (42 U.S.C. § 1973b(b) to include certain language minority groups such as Alaskan Natives. And in 1972, the three New York City boroughs of Manhattan, Brooklyn, and the Bronx were exempted but were recovered in 1974. The State of New York sued for exemption of the three counties because of the new reapportionment legislation that was being considered, and the Justice Department consented to the exemption of the three counties from the Act, and the New York legislature adopted its reapportionment plan which was used for the 1972 congressional elections. However, in 1973 the Justice Department reopened the case, and on January 10, 1974, the District Court for the District of Columbia rescinded the exemption.[20/]

[17/] Gaston County v. United States, 395 U.S. 285, 295-296 (1969).

[18/] 36 Fed. Reg. 5809 (1971).

[19/] Alaska v. United States, Civil No. 2122-71 (D.D.C. July 2, 1972).

[20/] New York v. United States, Civil No. 2419-71 (D.D.C.) orders of April 13, 1972, January 10, 1974, and April 30, 1974.

In 1976 the eighteen subdivisions in Maine[21] were exempted from coverage under the Act pursuant to section 4(a) (42 U.S.C. § 1973b(a)) by a consent decree by the District Court for the District of Columbia.[22] Also in 1976 three counties in New Mexico, which were brought in under the Act by the 1975 Amendments which included certain language minorities, such as American Indians, successfully removed themselves from coverage of the Act.[23] Likewise, in 1978, two counties in Oklahoma, which were also covered by the 1975 Amendment, which expanded the trigger formula to include certain language minorities, were successful in obtaining a consent decree from the District Court for the District of Columbia for removal from the Act.[24]

Virginia v. United States

In 1974 the State of Virginia brought an action for a declaratory judgment in the United States District Court for the District of Columbia for exemption from coverage of the Voting Rights Act of 1965. A three-judge court refused to allow Virginia to be exempt because Virginia's history of providing inferior and segregated schools for blacks during the period when most of the black voters in Virginia received their education would have a discriminatory effect on blacks of voting age to meet literacy requirements. The United States Supreme Court affirmed the District Court's judgment without opinion.[21]

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[21] The towns of Limestone, Ludlow, Woodland, New Gloucester, Sullivan, Winter Harbor, Chelsea, Charleston, Waldo, Beddington, and Cutler; Caswell, Nashville, Reed, Somerville, Carroll, and Webster plantations, and the unorganized territory of Connor.

[22] State of Maine v. United States, Civil No. 75-2125 (D.D.C. Sept. 17, 1976).

[23] The Counties of Curry, McKinley, and Otero, New Mexico, were exempted in the case of State of New Mexico, Counties of Curry, McKinley and Otero v. United States, Civil No. 76-0067 (D.D.C. July 30, 1976).

[24] The Counties of Choctaw and McCurtain were exempted in the case of Counties of Choctaw and McCurtain, Oklahoma v. United States, Civil No. 76-1250 (D.D.C. May 12, 1978).

City of Rome v. United States

In 1979 the City of Rome, Georgia filed suit for a declaratory judgment in the United States District Court for the District of Columbia seeking exemption from the Act pursuant to section 4(a) of the Act after the Attorney General refused to preclear certain annexations. A three-judge court refused to allow the City to "bail out" of the Act's coverage holding that the political units of a covered jurisdiction cannot independently bring a section 4(a) bailout action. The United States Supreme Court affirmed asserting that the City comes within the Act only because it is part of a covered State and that any "bailout" action to exempt the City must be filed by the State of Georgia.[22] Moreover, the Court asserted that the legislative history of section 4(a)'s "bailout" procedure makes it clear that it is available only to a covered "State" and not implicitly available to political units in the State when the whole State is covered.[23]

In summary, the only jurisdictions since 1965 to the present that have successfully "bailed out" of the Voting Rights Act of 1965, as amended, pursuant to section 4(a) (42 U.S.C. § 1973b(a)) without having been recovered are as follows: Wake County, North Carolina, (exempted in 1967); (2) eighteen subdivisions in Maine, supra (exempted in 1976); (3) Curry, McKinley, and Otero Counties, New Mexico (exempted in 1976); and (4) Choctaw and McCurtain Counties, Oklahoma (exempted in 1978).

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[21] Virginia v. United States, 386 F. Supp. 1319, 1323-1325 (D.D.C. 1974), aff'd, 420 U.S. 901 (1975); cf. Gaston County v. United States, supra.

[22] City of Rome v. United States, 472 F. Supp. 221 (D.D.C. 1979), aff'd 446 U.S. 156, 167 (1980).

[23] 446 U.S. 169.

The State of Alaska was able to be exempted in 1966 from coverage under the Act, but the Voting Rights Act Amendments of 1970 recovered Election Districts 8, 11, 12, and 13. In 1972 Alaska again successfully exempted itself from the Act, only to be recovered once more by the 1975 Amendments that expanded the trigger formula to include such language minority groups as Alaskan Natives. Similarly, Elmore County, Idaho and Apache, Navajo, and Coconino Counties, Arizona were exempted from the Act in 1966 but were recovered in 1970 by the 1970 Amendments to the Voting Rights Act when the trigger coverage formula was expanded to include the 1968 presidential election. In 1972 the New York City Boroughs of Manhattan, Brooklyn, and the Bronx successfully sued for exemption but were recovered in 1974 when the Justice Department reopened the case after the reapportionment of legislative seats had been taken care of.

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SECTION 5 OF THE VOTING RIGHTS ACT OF 1965: PROBLEMS AND POSSIBILITIES [1]

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The Voting Rights Act of 1965, 42 U.S.C. 1973 et seq., has been characterized as the most successful of the civil rights acts, and section 5, 42 U.S.C. 1973c, has been, during the past decade, the most important provision of that act.

To give an oversimplified definition, section 5 forbids, in jurisdictions covered under the special provisions of the Voting Rights Act, the implementation of any voting change without prior approval of the Attorney General of the United States District Court for the District of Columbia. An objection by the Attorney General, or the denial of a declaratory judgment by the court, is required if the submitting authority cannot show that the change in question does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

Congress first considered what became section 5 in 1965; subsequent congressional considerations were in 1969 and 1970 and in 1975. Congress's next opportunity will be in 1982, with preliminary consideration by the civil rights subcommittee of the House Judiciary Committee to begin in 1981. This paper presents some of the questions that members of Congress might raise with respect to section 5, some questions on which theoretical or empirical research by political scientists prior to the congressional deliberation might be relevant, and some suggestions for possible modifications of section 5.

First will be considered some questions with respect to the legal standard to be followed under section 5; second, questions with respect to remedies for violations of section 5, the types of changes and entities to which section 5 applies, the interpretation of section 5, and the administration of section 5, and third, questions with respect to the overall evaluation of section 5 and possible changes in its coverage and termination rules.

The text of section 5 follows:

SEC. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard practice or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibition set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race of color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification prerequisite, standard, practice, on procedure: *Provided*, That such qualification, prerequisite standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

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[1] The views expressed in this paper are those of the author and not necessarily those of the United States Department of Justice.

The Attorney General's Procedures for the Administration of Section 5 of the Voting Rights Act of 1965 were published on September 10, 1971. 36 FR 18186, 28 CFR Part 51. Proposed revised Procedures were published on March 21, 1980. 45 FR 18890. References in this paper to the section 5 Procedures are to this proposed revision. The publication of final revised Procedures is expected in the fall of 1980.

LEGAL STANDARD

Beer

One alleged virtue of section 5 is that it incorporates an effort standard of discrimination and not like the 14th and 15th amendments and section 2 of the Voting Rights Act, a standard that appears to require the consideration of purpose. The model of effect analysis under section 5 is that explained by the Supreme Court in *Beer* v. *United States*, 425 U.S. 130, 140–41 (1976): Compare the new practice with the old to determine whether the change makes blacks better or worse off. If the latter, the change is objectionable. The effect standard, however, is not as simple as it may appear.

For example, a polling place is moved from a church in the middle of a black neighborhood to a school a significant distance from the black neighborhood. This looks like a clear example of a "retrogressive" and therefore objectionable change. But consider the circumstances in which such a change might have occurred:

1. The new polling place is farther away but past experience shows that such an increase in distance does not affect turnout.
2. The increase in distance will result in a lower turnout but not it is argued because anyone's right to vote is denied or abridged but because some people will not bother to take an extra ten minutes.
3. Although the increase in distance will result in a lower turnout, the use of the new polling place will save the city a significant amount of money.
4. Although the increase in distance will result in a lower turnout, air conditioning at the school will significantly increase the comfort of voters.
5. The change implements a consistent citywide policy of using public buildings rather than churches.
6. The voting precinct also includes a Mexican American neighborhood; the new polling place is halfway between the two neighborhoods.
7. The population of the black neighborhood has declined to below the number required by state law for a separate voting precinct.
8. Turnout will be reduced not because the residents are black but because they are poor and cannot afford automobiles; the poverty of the blacks can be attributed to past discrimination.
9. Turnout will be reduced because the black residents of the neighborhood are poor but the income distributions for white families and black families in the city are equal.
10. The city clerk who decided to move the polling place is black.

Each of these circumstances would appear to be relevant to the determination with respect to the polling place change, but what their relevance is cannot be discerned from examination of the *Beer* standard.

After *Bolden* v. *City of Mobile*, —— U.S. —— (April 22, 1980), section 5 is practically unique in voting rights law in employing an effect test. This means that there will not be a convenient body of law outside the section 5 area to which the Attorney General or the District of Columbia district court can look for guidance.

The court in *Apache County High School District No. 90* v. *United States*, —— F. Supp. —— (D.D.C. June 12 ,1980), employed a two-part analysis, either recognizing difficulties such as those described above or adding a new layer to the required analysis.

The court first determined that the change—a reduction in the number of polling places—was retrogressive; then it inquired whether the change was discriminatory in effect. Slip opinion, pp. 10–11.

There is not always an old practice available for comparison. The city, for example, may be newly incorporated and selecting a polling place for the first time. While this would appear to make the determination more difficult, the prior discussion suggests that it may not be. The analysis of the choice among alternatives will resemble the analysis of a change from one to another.

Section 4(f)(4) of the Voting Rights Act requires certain jurisdictions to conduct bilingual elections. Where elections have not been bilingual in the past the failure to conduct bilingual elections now may violate section 4(f)(4) but would not be retrogressive under *Beer*. A reasonable position for the courts to take would be that a violation of a statute designed to protect minority voting rights automatically has the effect of denying or abridging minority voting rights—*Beer* analysis does not apply. The court in *Apache County*, however, did not take this approach. The failure to publicize a bond election in the Navajo language violates section 4(f)(4), the court said, but it does not automatically violate section 5 because it is not retrogressive. However, the reduction in the number of polling places for the same election is retrogressive. Therefore, the retrogression test is satisfied in general for all changes involved, and any change that is discriminatory is objectionable whether retrogressive or not. Slip opinion, p. 13. If, however, the failure to provide publicity in the Navajo language does not by itself violate section 5, it is not at all clear why it should become a violation when coincidentally the number of polling places is reduced.

If this method of analysis is considered a good practical way to evade the Supreme Court's *Beer* rule, consider these questions:

1. Suppose the court, following the two-part analysis it finds required, decides that the reduction in the number of polling places, though retrogressive, is not discriminatory, can it use nondetermination in retrogression to open the door?
2. Suppose the reduction in the number of polling places will inconvenience blacks but not Indians, does it still satisfy the threshhold test?
3. Suppose the reduction in the number of polling places and the bilingual election plan are presented in separate submissions. Can retrogression found in one submission be borrowed for use in another?

Section 51.37 of the proposed revised section 5 Procedures may give the Attorney General a tool with which to meet at least the third problem. When two separate but related submissions are received, the response deadline for the former is delayed to coincide with that of the latter. The fundamental unit for section 5 analysis had been the change. Is there now a second fundamental unit—the package of changes? How is *it* defined?

Group voting rights

Although it is not an easy distinction to make, it is useful for understanding section 5 analysis to distinguish between individual and group voting rights. Two features distinguish the group right from the individual right. First, it makes no sense to talk of a group right unless racial bloc voting exists. That is, there must be a group for voting purposes before a right of the group can be infringed. Secondly, in a group perspective analysis the electoral process is viewed as a zero sum game.

For example, a city has a black neighborhood and a white neighborhood and one polling place, located in the black neighborhood. If a second polling place is established, in the white neighborhood, it will be more difficult for individual blacks to vote, and thus no abridgement of any individual's right to vote has occurred. Increased white participation, however, would result in a diminution of black political influence, and thus in an abridgement of the groups' right to vote.

Legal and political fights about black suffrage have always concerned the allocation of political power and not merely the right to vote of individuals. Whether section 5 analysis would take into account the effect of voting changes on group influence as well as that on individual rights was not decided until 1969, when the Supreme Court decided that the adoption of at-large elections was subject to section 5. *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969). The Court reasoned that a change in electoral system could nullify a minority group's ability to elect the candidate of its choice. 393 U.S. at 569. That such a result would violate section 5 is based on the one person, one vote standard of *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964): "(T)he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." The notion of group rights, however, is completely foreign to the analysis of *Reynolds*: the only concern is the mathematical equality of individual voters. See 377 U.S. at 561. Although the conduct of elections at large rather than by single-member districts may affect the political influence of groups, it will not affect the value of the vote of any single voter apart from that voter's membership in a group.

A group influence analysis presents not only many of the difficulties suggested above that complicate the individual right analysis but also new ones:

First, how does one trade off concentrated political control in one system or under one districting plan against broader political influence under another system or plan? In *Allen* Justice Harlan was unsure "how a court would go about deciding whether an at-large system is to be preferred over a district system. Under one system, Negroes have *some* influence in the election of all officers; under the other, minority groups have *more* influence in the selection of *fewer* officers." 393 U.S. at 586. That problem has not been solved, although the Supreme Court in *Allen*, *City of Richmond* v. *United States*, 422 U.S. 358 (1975), *Beer*, and *City of Rome* v. *United States*, ——U.S. —— (April 22, 1980), based its analysis on the abiilty of blacks to elect *black* candidates or candidates of their choice.

Second, if the criterion is control rather than influence, what propostion of the seats must blacks control for section 5 to be satisfied? Is anything less than proportional representation sufficient?

Third, although racial bloc voting must be present before a practice can be found objectionable under the group influence approach, how the presence of racial bloc voting is to be established is not clear:

1. Does one analyze all elections, only elections where black candidates are running against white candidates, or only elections in which there are issues that are viewed as racial?
2. Racial bloc voting follows a continuum, while a section 5 determination is Yes or No. At what point on the continuum does No become Yes?
3. Does apparent racial bloc voting have legal significance if it can be explained in terms of other factors, such as income level?

In addition, one wonders whether the significance attached to racial bloc voting will lead to its perpetuation.

Fourth, in measuring the political influence of blacks (or potential black control) should one consider actual political influence based on present registration, voting, and drop-off rates or theoretical influence based on a level of participation equal to the level for whites? If one controls for some factors but not others, how does one determine for which to control? How does one determine the extent to which disparities are the residual effect of racial discrimination? How does one determine the extent to which a discriminatory electoral system or district plan discourages participation? See *United States* v. *State of Mississippi*, —— U.S. —— (Feb. 19, 1980).

Fifth, to what extent can a redistricting plan that has a negative political impact on blacks be justified by the use of other criteria, such as contiguity, compactness, or respect for political or natural boundaries?

Sixth, is a redistricting plan generated by a fair procedure automatically acceptable, regardless of its impact on black political influence? If it is, how is a fair procedure recognized? Should such a procedure be colorblind or should it affirmatively seek to compensate for past discrimination?

Finally, one method of assessing the political influence of blacks under different electoral systems or under different theories of district composition is to measure the responsiveness to blacks of officials elected under different systems or theories. This can be done by analyzing voting or actions taken on issues in which there is consensus among blacks but not between blacks and other groups. Such an analysis presents a number of difficulties. How are views to be ascertained? Are the views of nonvoters to be considered? How much consensus among blacks and lack of consensus between blacks and other groups is required for an issue to be included in the analysis? How great a percentage of the total range of public issues must be included in the analysis for it to be meaningful? Many issues on which there are votes in a legislature are not ones on which a public opinion poll can obtain views. If one assumes that black members of the legislature represent the black point of view, a circularity problem arises. Can we rely on the subjective judgment of the investigator to establish what the black view is?

Annexations

The analysis of annexations presents special problems. In *Perkins* v. *Matthews*, 400 U.S. 379 (1971), the Supreme Court described two ways in which annexations could have a discriminatory effect. First, an annexation determines who may and who may not participate in municipal elections. 400 U.S. at 388. This is the individual right analysis and is based on *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). Secondly, an annexation "dilutes the weight of the votes of the voters to whom the franchise was limited before the annexation." 400 U.S. at 388. This is analogous to one person, one vote analysis, and *Reynolds* v. *Sims*, 377 U.S. at 555, is cited in support. But the individual right one person, one vote analysis will not work here. In a one person, one vote case it makes sense to say that one person has only one-half a vote while another has one and one-half. When the number of voters is increased by an annexation, however, all votes continue to have equal value. What is required, therefore, is a group analysis. For this analysis the straight forward mathematical approach of the one person, one vote cases cannot give a result. Assume a city now has 50 whites and 50 blacks. Is any annexation that brings in more whites than blacks (or more blacks than whites) objectionable?

In *City of Richmond* v. *United States* the Supreme Court explained under what circumstances an annexation would be held to abridge the right to vote on account of race or color: "(T)he annexation of an area with a white majority," in the context of racial bloc voting, is objectionable if it "created or enhanced the power of the white majority to exclude Negroes totally from participation in the governing of the city through membership on the city council." A "fairly designed ward plan", however, would remove that power of the white majority and therefore render an annexation unobjectionable. A plan that affords blacks "representation reasonably equivalent to their political strength in the enlarged community" would count as fairly designed. 422 U.S. at 370.

City of Richmond, however, did not present the Court an opportunity for explaining what it means by equivalent representation. At a minimum, equivalent representation has been achieved in a city where blacks constitute 42 percent of the population (reduced from 52 percent) if four of nine district have at least a 64 percent black majority and a fifth is 40.9 percent black. 422 U.S. at 372. The recently decided *City of Rome* v. *United States* does not clarify this issue. See slip opinion, p. 29. It is also not clear from *City of Richmond* how small an increase in the white population percentage will still have the effect of enhancing the power to exclude. Indeed, would not the annexation of vacant land where whites are reasonably expected to live in the future have an enhancement effect? (See Objection of Aug. 15, 1980, Statesboro, Georgia.)

Purpose

While the effect standard may be harder to apply than may appear at first blush, the purpose standard may be redundant. Suppose a polling place that serves a black precinct is moved 100 yards—to the other side of a river with the nearest bridge or ferry several miles away, and that there is nothing wrong with the old polling place. It will not be difficult to conclude that there will be a discriminatory effect. Is there any reason to require whether the change was made in order to minimize black voting or whether an administrator had an erroneous belief that there was a bridge at that point of the river? On the other hand, suppose there *is* a bridge spanning these hundred yards and the Attorney General learns that the administrator erroneously believed that there was not a bridge and that this hundred yard change would substantially reduce black participation? Should the Attorney General object? To give a more relevant hypothetical, suppose a county council adopts following the 1980 census a new districting plan designed to reduce the number of districts that black voters will control. Through miscalculation, however, the number of such districts is increased instead.

One solution to the difficulties of the effect and purpose standards would be to eliminate those terms from section 5, so that the language of section 5 would track that of section 2 of the Voting Rights Act and of the 15th amendment. While this would still leave a difficult legal question (or perhaps two difficult questions) it would eliminate the difficulty of defining a separate standard under section 5. One would have to consider carefully, however, whether such a standard would sufficiently protect minority voting rights.

Remedies[3]

The area of enforcement of section 5 has difficulties that were not anticipated in 1965. If the change in question is, for example, the requirement that a potential registrant provide his zip code, the text of section 5 provides a guide to the appropriate remedy. The Department of Justice (or a private plaintiff under *Allen*) will request a court to enjoin the jurisdiction from prohibiting persons who have not provided their zip codes but are otherwise eligible from casting ballots. For changes other than in standards or requirements directly relating to registering to vote or voting, the language of section 5 is not helpful. The broad interpretation given to section 5 by the Supreme Court (discussed below) has led to many such situations. Among the questions that have arisen are the following:

1. Is there a distinction with respect to enforceability between changes that have not yet been submitted to the Attorney General, changes that are pending before the Attorney General, and changes to which objections have been interposed?
2. If a suit is brought, does it mater whether the unprecleared change is racially discriminatory or not?
3. If a private suit is brought, must there be an allegation that the plaintiff will be damaged by enforcement of the unprecleared change?
4. Under what circumstances should an election rather than just the unprecleared change be enjoined? Can the court order the jurisdiction to use a practice other than the old or new ones?
5. For an election to be set aside must preelection relief have been requested from the court?
6. For an election to be set aside must the use of the change have affected the outcome of the election?
7. Do state courts have jurisdiction to issue injunctions under section 5?
8. Must normal procedural rules (state or federal) for challenging elections be followed when section 5 is used?

One of the questions that has not been resolved is whether state courts have jurisdiction to enforce section 5. Civil rights litigation is normally brought in federal courts, but there is in general no reason why a plaintiff could not choose a state court if he so desired. The only reason that has been offered for barring state courts from section 5 enforcement is the three-judge court requirement. See *Beatty* v. *Esposito*, 411 F. Supp. 107, 111 (E.D.N.Y. 1976). That reason, however, is insubstantial. Two reasons for the use of three-judge courts are the need for careful deliberation before actions of states are interfered with and the need for speedy appeals to the Supreme Court. The first issue would not arise if the case were before a state court. The second issue would be considered by the plaintiff in deciding which forum to choose. In any event, the use of three-judge courts has practically been expunged from Title 28 of the United States Code; Congress might well consider whether its retention for section 5 is necessary.

Voting changes

Section 5 requires federal review of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect" on one of three dates specified in the act. As originally drafted and introduced in Congress it was clear that section 5 covered any initiation of what section 4(c) defines as tests or devices. It is evident from the legislative history and agreed by all members of the Supreme Court in *Allen* v. *State Board of Elections* and *Perkins* v. *Matthews* that section 5 also covers any change in the mechanics of voters registration, casting a ballot, or the counting of ballots. It is safe to say that it is well settled that four other kinds of voting changes are covered, although Supreme Court unanimity was not achieved with respect to them:

1. Changes in standards, rules, and procedures with respect to access to the ballot for candidates political parties, and issues. *Allen*.
2. Changes in electoral decision rules. *Allen*.

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[3] See generally J. MacCoon, *The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965*, 29 Cath. U.L. Rev. 107 (1979), for a detailed discussion of some of the questions raised in this section.

3. Changes in the composition of election districts and political subunits. *Perkins; Georgia* v. *United States*, 411 U.S. 526 (1973).

4. Governmental employment rules that affect voting. A divided Supreme Court held in *Dougherty County, Georgia, Board of Education* v. *White*, 439 U.S. 32 (1978), that regulation of the political activity of public employees is covered by section 5. A fortiori one would expect governmental employment rules with respect to taking time off to register or to vote or to participating in voter registration drives to be covered.

With respect to four other kinds of voting changes either the application of section 5 or the extent of its application is unclear:

1. Changes in governmental organization.—Changing an elective office to appointive is covered (*Allen*), as is changing an appointive office to elective (*Horry County* v. *United States*, —F. Supp. — (D.D.C. May 4, 1978)); does it follow that changing the powers of an elective office is covered? What about changing the remuneration? If after a black is elected sheriff in a county for the first time the sheriff's power to arrest is removed and the sheriff's salary is cut in half, it would appear that the effectiveness of the black voters' franchise has been reduced. On the other hand, should section 5 review be required whenever a state legislative adds to the responsibilities of the governor or approves a governmentwide pay increase? Should the process by which legislative committee assignments are made or the actual assignments be subject to section 5 review?

2. Changes arguably not concerned with voting implemented by a government office that is concerned with voting.—For example, are the employment practices of an elections office or of a registrar's office, the location of election personnel who have no contact with the public, or a change in the computer program for revision of a voter registration list subject to section 5?

3. Changes that affect voting but which are not classified by the government involved as changes in voting qualifications, prerequisites, standards, practices, or procedures.—For example, libraries in a county library system are used as polling place locations; the county decides, for budgetary reasons, to eliminate certain branch libraries. Does section 5 apply to the closings themselves as well as to the resulting polling place changes? Section 5 applies to an annexation that will have an effect on the size of a city's electorate; does section 5 apply to a zoning decision that will have an effect on the size (and racial composition) of a city's electorate?

4. Metachanges.—For example, a change in the location of a polling place is covered. At the next level up, is a change in the criteria for the location of polling places also covered? At the level above that, is a change in who determines the criteria for polling place location covered? See 28 CFR 51.15.

In all four types of changes that have been described, a connection to the right to vote can be made and an example can be created in which the change is racially discriminatory, either in purpose or in effect, with respect to the electoral process. Nevetheless, further extending the reach of section 5 would lead to federal review of a much higher proportion of state and local governmental actions.

In considering the Voting Rights Act in 1982, Congress may wish to establish limits. A number of factors should be examined in such an attempt:

1. Where can a line be drawn that will make it easy to determine whether a change is covered by section 5 or not?

2. With respect to what kinds of changes is racial discrimination more likely to be encountered?

3. With respect to what kinds of changes are alternative remedies less satisfactory?

4. With respect to what kinds of changes is section 5 preclearance less intrusive in or disruptive to local decision making?

Research to provide answers to these questions is required. However, it appears plausible to expect an exploration and balancing of these factors to lead to the conclusion that it is most important to retain section 5 for changes in electoral decision rules and changes in the composition of election districts and political subunits.

A narrowing and clarification of the scope of section 5 could be beneficial in another way. Complete compliance with the preclearance requirement is practically impossible in two respects.

First, no matter how many changes an official submits to the Attorney General, a student of section 5 can always find another change that has not been submitted. For example, a probate judge always submits changes in the location of polling places, but he neglects to submit the rearrangement of tables and booths at one polling place.

Second, no matter how well an election administrator plans in advance of an election, there will always be changes that must be implemented before they can be precleared. For example, a polling place burns down the night before the election.

The limitation of section 5 to changes in electoral methods and units would eliminate from coverage the administrative changes that can be found wherever one chooses to look or that are required unpredictably. (But see 28 CFR 51.32.)

An alternative would be to retain the present types of covered changes but to exempt minor changes. However, a simple criterion for identifying minor changes would be required. One can imagine situations in which a furniture rearrangement interferes with minority voting.

Jurisdictions

Section 5 applies to states and counties; it also applies to cities (see *United States* v. *Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978)), school districts, and presumably to other special purpose units of government, such as water districts, hospital districts, junior college districts, ship canal districts, and the like. *Dougherty County* held that section 5 applies to a unit of government that does not itself register voters or conduct elections and is not governed by elected officials. The Dougherty County Board of Education had adopted a rule regulating the political activity of school district employees. If a public transit authority entered into a new collective bargaining agreement with its employees that changed the time off to vote allowance, would section 5 apply?

An underdeveloped area is the status of quasi-governmental entities. Is a change in the procedure for electing the board of directors of a state-sponsored housing development corporation or of a parent-teacher association covered? What is the status of elections for quasi-governmental advisory committees such as are required under a number of federal programs? Are elections conducted by a community action agency or by the Department of Agriculture covered? Should the test be whether action of the entity is state action under the 14th amendment? Whether the entity is constitutionally required to permit any registered voter of the jurisdiction to participate in its elections?

If Congress wished to restrict the application of section 5 to those governmental entities of most obvious political relevance it could add a proviso to section 5 exempting special purpose governmental units other than school districts.

One type of entity the status of which under section 5 has been litigated, though inconclusively, is the political party. The Department of Justice has attempted to formulate an approach to political parties that recognizes their role in the history of discrimination in voting against blacks in the South and their continued importance in the administration of electoral activities but that also acknowledges the rights of free speech and free association guaranteed under the first amendment:

> Certain activities of political parties (section 51.7 of the proposed revised Procedures states) are subject to the preclearance requirement of section 5. A change affecting voting effected by a political party is subject to the preclearance requirement (1) if the change relates to a public electoral function of the party and (2) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5. For example, changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement. Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of section 5. . . .

The more interesting examples are probably located somewhere in between the two sets of examples provided in section 51.7.

Voting changes are sometimes ordered by courts. In 1971 the Supreme Court decided that a redistricting plan (and presumably other voting practices) ordered by a federal court is not subject to section 5. *Connor* v. *Johnson*, 402 U.S. 690, 691 (1971). This has led to a substantial amount of litigation with respect to the scope of the exception. See *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636, 638–39 n. 6 (1976); *Wise* v. *Lipscomb*, 437 U.S. 535 (1978); *Sanchez* v. *McDaniel*, 615 F.2d 1023 (5th Cir. 1980), application for stay pending consideration of petition for certiorari granted, — U.S. — (Aug. 14, 1980) (Powell, Circuit Justice), and 28 CFR 51.16.

If a covered jurisdiction seeks to implement a voting change that has been ordered by a state court must it make a submission under section 5? For example, a state has a rule that a school district employee cannot run for the board of education. A court decides that an employee of District A cannot be a candidate in District B. If District B thereupon removes the candidate from the ballot, must it make a submission? There are three contexts in which this question could arise:

1. The court decision is in accord with the settled law (since at least November 1, 1964). Section 5 would not apply.
2. The court decision reverses the settled law. Section 5 would apply.
3. There is no settled law or the case is one of first impression. The section 5 court would have to decide what outcome would have been reached on November 1, 1964.

Deciding which of the three contexts was present and, if the third, the further question would be tantamount to relitigating the case. Given these complexities, it is understandable that courts have been reluctant to apply section 5 to changes resulting from state court litigation. On the other hand, the potential for the use of state courts as a vehicle of discrimination makes understandable why civil rights advocates oppose a state court exemption. Litigation has not yet led to a resolution of this question. See *Gangemi* v. *Sclafani*, 506 F.2d 570, 572 (2d Cir. 1974).

Congress may also in 1982 wish to address the status of political parties and changes ordered by courts, but its decision to continue to leave such matters to the resolution of the courts would not be surprising.

Other unresolved questions

Is action by a covered state that affects voting but only in an uncovered state subject to section 5? For example, suppose the State of Mississippi has the following law: "All persons employed within the State of Missisippi must be allowed two hours off with pay to vote in any election for which they are eligible to vote." An amendment is enacted that adds the words 'conducted by the State of Mississippi or any county, municipality, or school district of the State of Missisippi" following the word "election", thus denying the benefit of the time off rule to residents of Tennessee who are employed in Mississippi. Must the amendment be submitted? If it is, can the Attorney General consider its purpose and effect with respect to Tennessee voters?

While section 5 will prevent a change to a new practice that is racially discriminatory, it does not appear to prevent the return to a discriminatory practice in effect on November 1, 1964. For example, a county as of that date maintained racially segregated polling places, whites on one side, blacks on the other. In 1966 it integrated its polling places, for which action section 5 preclearance was obtained. In 1980 it repeals the integration ordinance, returning to the 1964 system of segregation. A literal reading of section 5 would indicate that the return to segregation is nót subject to section 5 (although it would violate federal law in other ways). A court recently adopted a nonliteral interpretation to reach such a situation. See *NAACP, DeKalb Counter Chapter* v. *State of Georgia*, —— F.Supp. —— (N.D. Ga. June 11, 1980).

The law of a state requires, for example, any city having a population of 500,000 or more to elect its city council at large and has so required since prior to November 1, 1964. In 1980 a city in that state reaches the half million mark and changes, pursuant to the state rule from single-member district election to at-large election of its city council. Has a change subject to section 5 occurred? If it has, can the city be forced to conduct its elections in violation of a state law not itself subject to section 5? This question has not been resolved. See *Fore* v. *Cooke*, op. no. 20953 (S.C.S. Ct. May 3, 1979); *Beer*, and 28 CFR 51.14.

Whether there has been a change in a practice or procedure depends on how that practice or procedure is characterized. Suppose for example, that on the first Tuesday of each even year November a city holds a councilmanic election and on the first Tuesday of each odd year November it holds a charter amendment election. For the former election two polling places are always used, for the latter only one. Is there a change subject to section 5 review each year or never (if the practice of alternation has been in effect since November 1, 1964)?

Does it make a difference whether the number of polling places for the two different kinds of elections is established in the city charter or is determined annually by the city council?

The Department of Justice, in its proposed revised section 5 Procedures, 28 CFR 51.13, seemed to indicate that such an alternation does not result in an annual change subject to section 5. The court in *Apachc County*, however, held that an election is an election, regardless of how the city may attempt to characterize it. See slip opinion, p. 12.

Unless the Voting Rights Act is again amended, some jurisdiction will in the next decade bail out. At that time, what is the legal status of an objected to practice that has been neither repealed nor replaced? The idea of a day of resurrection was suggested for the first time by Mr. Justice Stewart in *Bolden*. Slip opinion, pp. 2–3, n., 6. For such a practice to be suddenly revived, after perhaps years of disuse, could be disruptive and could again abridge minority voting rights. Is this question properly one of state or federal law?

Administration

A negative feature of section 5 is that it reduces the efficiency and adds to the cost of the administration of the electoral process. Even if we assume that administration of the preclearance process by the Attorney General is flawless, additional duties are imposed upon state and local government officials, and delays are added to the electoral process. For example, many southern cities frequently annex small parcels of lands as a result of petitions from the owners. A conscientious city attorney will send a letter to the Attorney General for each such annexation, enclosing a copy of the ordinance, a map, and population data for the tract. It would be of interest to add up the total cost of reasonable compliance with section 5 and of the administration of section 5 by the Attorney General. Looking at the actual cot could only be the starting point for such a project, for many jurisdictions spend far more than is necessary on the preparation of submissions, while others fail to make required submissions or make submissions that are less than acceptable. Because section 5 adds a layer to the approval process, it provides a deterrent to change and an excuse to election administrators who do not want to make change. The extent to which section 5 has deferred progressive change has not been measured.

EVALUATION

The problems that have been discussed above have not prevented section 5 from being effective. Three general questions need to be raised in an evaluation of the future effectiveness of section 5.

1. To what extent has section 5 prevented the abridgment of minority voting rights, either directly through objections by the Attorney General or denials of declaratory judgments by the District of Columbia court or indirectly through the deterrence of potentially discriminatory voting changes?
2. To the extent that section 5 has prevented such abridgments, can it be expected to continue to in the future?
3. Are there alternative approaches that would have a preferable combination of benefits and costs?

(The general expression "abridgment of minority voting rights" is used in the first question because specification of the goal of section 5 is a difficult problem. Of "Legal Standard" above.)

Devising empirical research that will shed light on these questions will not be easy. A qualitative study comparing a small group of counties that have been covered under the special provisions of the Voting Rights Act with a group matched demographically and historically that have not been covered would be instructive. With respect to alternative approaches, the effect of the process of problem solving should not be neglected. For example, if a polling place is moved to a location that will significantly reduce black participation, local resolution of the problem may have benefits for both sides: blacks may develop negotiating skills and gain self-esteem; officials may gain sensitivity to the concerns of blacks. The local process of problem resolution may help prevent similar—or dissimilar—problems in the future. Where discrimination is prevented by the Attorney General through section 5, however, this local process is less likely to occur. If the day comes when the protection of section 5 is removed by Congress, both blacks and officials may be less prepared than they otherwise would have been.

One also needs to consider, 14 years later, whether there is any vitality remaining in the federal principle critique of section 5 of Mr. Justice Black, dissenting in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966).

Coverage criteria

The criteria that led to coverage under section 5 in the South were the use of literacy tests and a low voter participation rate; the criteria used in the Southwest were the absence of sufficiently bilingual elections and a low voter participation rate. Coverage will end when the use of literacy tests or of English-only elections has been terminated for the number of years indicated in the act. The underlying assumption was that when minorities had a secure enough role in the political process they would no longer require the special protection of section 5 and of the other special provisions of the Voting Rights Act.

So long as voting to a significant extent follows racial lines, determining when that point has been reached will be difficult. No matter how well blacks can do on their own, section 5 will give them extra bargaining strength. Moreover, the stronger black political strength grows, the less likely it would appear that members of Congress from districts or states having significant black populations will vote against extension of the act. Thus as the need for section 5 declines, the likelihood of its expiration would also decline.

As we have gotten farther removed from the problem of discriminatory denial of the right to register to vote, restricted to the South, and have become primarily concerned under section 5 with the effect of changes in electoral systems, changes in district lines, and annexations on group voting strength, the application of section 5 in some states but not others becomes harder to explain except historically. Why should not there be the same scrutiny of legislative redistricting plans in Arkansas, Florida, or Tennessee as there is in Georgia, North Carolina, or Virginia? The same scrutiny in Detroit or Los Angeles as in New York or Houston?

The present structure of the Voting Rights Act includes neither a mechanism for allowing jurisdictions with a clean record to remove themselves from coverage nor a mechanism (except relief under section 3 in voting rights litigation) for adding jurisdictions where protection is needed. An alternative would be to allow bail-out if a state (or other covered jurisdiction) for a certain period, for example, two years, had received no section 5 objections not subsequently withdrawn as mistaken or overturned in the District of Columbia court and had not been enjoined under section 5. Such bail-outs could either be allowed, as present, only on a statewide basis, or county bail-out could be authorized.

If Congress wishes to reach jurisdictions not now covered under the act, it could amend the act to provide coverage in states or other jurisdictions in which the Director of the Census finds (1) that the citizen voting age population of a single racial minority group exceeds X percent of the total citizen voting age population of the state or other jurisdiction and (2) that racial bloc voting exists. These criteria are appropriate if concern is with possible abridgement of group voting rights. Unless a group reaches a threshhold level it will not be able to control any legislative districts no matter how they are drawn. Unless there is racial bloc voting, there is no group whose political strength is in need of protection. If such an approach is taken, Congress (or the Director of the Census) will need assistance in—

1. Designating and defining racial minority groups,
2. Setting the threshhold population percentage,
3. Deciding how to measure racial bloc voting, and
4. Setting the racial bloc voting threshold level.

If coverage is dictated through this test then bail-out could be based either on these criteria's no longer being satisfied or on the performance test described above.

The original act and its 1970 amendment were carefully written in colorblind terms. The suggested alternative follows the precedent of the 1975 amendments, which base coverage, in part, on the presence of a certain percentage specified groups. If Congress wishes to return to the colorblind approach it could impose nationwide coverage. If nationwide coverage were combined with limitations on the types of jurisdictions that are covered and on the types of changes that fall under section 5 and with the clean-record approach to bail-out, as suggested above, the burden on state and local governments would not be unconscionable.

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, D.C., February 1, 1982.

To: Senate Judiciary Committee, Attention: Steve Markman.
From: Eugene Boyd, Analyst in American National Government, Government Division.
Subject: City Council At-Large System of Voting.

The attached material is in response to your request for information identifying cities with 1980 populations of 100,000 or more that elect some or all of their city council members by an at-large system of voting. * * * As I stated in a telephone conversation with you, the table is from the 1972 edition of the Municipal Yearbook. Our contact with various sources indicates that this is the most recent published data available. Seventy-nine communities with 1980 populations of 100,000[1] or more elect their entire city council by an at-large system of voting and thirty-nine communities elect some portion of their councils by such a system. The attached table does not identify those communities that may have changed their system of voting in councilmatic elections since the publication date of the Municipal Yearbook.

I trust that this information meets your needs. Should you have any questions please call me at 287-8689.

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[1] Population data given in the table are for 1970, but I marked up the table based on 1980 census data. This accounts for cities of less than 100,000 in 1970 being denoted.

Data for 1,908 cities are presented in this table, based on a survey conducted in late spring and early summer of 1971.

1970 population: as reported in Bureau of the Census PC(V1) Series.

Form of government, charter of basic law: to left, city form of government; to right, type of charter or basic law within which the city operates (see keys below).

Mayor: Selection, term, right to vote: to left, indicates how mayor is selected (see key); middle, term of office in years; to right, indicates mayor's right to vote in council meetings (see key). Authority to veto, in what cases: to left, indicates if mayor has the authority to veto council-passed measures ("Y" for yes); to right, indicates in what cases mayor may exercise veto power (see key).

Council: Total, number elected—at large, by wards, other: to far left, total number of members on legislative body; an asterisk (*) indicates total number excludes the mayor. Next, number of councilmen elected at large; next, number elected by wards or districts; far right, number elected other ways. Paid set salary, annual salary: to left, indicates if councilmen are paid a set annual, monthly, or weekly salary ("Y" for yes); to right, approximate annual salary. Filling council vacancy: indicates how a vacancy is filled for a councilman (see key). Council staff, other services: to left, indicates if the council is provided a staff of either professional or clerical personnel ("Y" for yes); to right, other items or services provided all councilmen (see key).

Other directly elected officials: indicates those officials directly elected by the people (see key). Leaders (- - - -) indicate data either not reported or not applicable. All footnotes are at the end of the table.

TABLE 3/20.—FORM OF GOVERNMENT IN CITIES OVER 5,000: 1971

City	1970 population	Form of government charter or basic law	Mayor		Council				Other directly elected officials
			Selection, term, right to vote in council	Authority to veto, in what cases	Total, number elected—at large, by wards, other	Paid set salary, annual salary (dollars)	Filing council vacancy	Council staff, other services	
Over 1,000,000									
Chicago, Ill	3, 366, 957	2-2	2-4-..	Y-..	50-..-50-..	Y-8,000	1	Y-1,2,3,4,5,6	3,5
Detroit, Mich	1, 511, 482	1-5	2-4-3	Y-1	9-9-..-..	Y-17,500	1	N-1,3,5,6,7,8	3,5
Houston, Tex	1, 232, 802	1-5	2-2-1	Y-2	8-3-5-..	Y-3,600	3	Y-1,5,6,7	2
Los Angeles, Calif	2, 816, 061	1-5	2-4-3	Y-6	15-..-15-..	Y-17,000	5	Y-1,2,4,5,6,7,8	2,13
New York, N.Y	7, 867, 760	1-5	2-4-3	Y-1	37-10-27-..	Y-20,000	3	Y-1,2,3,4,5,6,7	2
Philadelphia, Pa	1, 948, 609	1-5	2-4-3	Y-2	17-7-10-..	Y-18,000	1	Y-1,2,3,4,5,6,7,8	2
500,000 to 1,000,000									
Baltimore, Md	905, 759	2-5	2-4-3	Y-2	19-1-18-..	Y-6,500	5	Y-1,3,4,5,7,8	2
Boston, Mass	641, 071	1-4	2-4-3	Y-1	9-9-..-..	Y-15,000	5	Y-1,2,3,4,5,7	----------
Cleveland, Ohio	750, 903	1-5	2-2-3	Y-2	33-..-33-..	Y-12,500	3	Y-2,3,4,5,6,7,8	----------
Columbus, Ohio	539, 677	1-5	2-4-3	Y-1	7-7-..-..	Y-8,000	3	Y-1,2,3,4,5,6,7,8	1,13
Dallas, Tex	844, 401	3-5	2-2-1	None	10*-3-8-..	None	3	Y-5,6,7,8	----------
Denver, Colo	514, 678	2-5	2-4-3	Y-2	13-2-11-..	Y-7,500	2	Y-2,3,4,5,6,7,8	3
Indianapolis, Ind.[1]	744, 624	1-2	2-4-3	Y-1,3,5	14-14-..-..	Y-3,600	3	Y-1,4,5,6,7	1,3,4
Jacksonville, Fla	528, 865	1-5	2-4-3	Y-1	19-5-14-..	Y-5,000	1	Y-1,2,3,4,5,6,7,8	4,10
Milwaukee, Wis	717, 099	2-6	2-4-3	Y-1,6	19-..-19-..	Y-11,351	3	Y-1,2,3,4,5,6,7,8	2,3,5,13
New Orleans, La	593, 471	1-5	2-4-3	Y-2	7-2-5-..	Y-10,000	1	Y-1,2,4,5,7,8	4
Phoenix, Ariz	581, 562	3-5	2-2-1	None	7-7-..	Y-3,000	3	N-2,5,7,8	----------
Pittsburgh, Pa	520, 117	2-3	2-4-4	Y-2,3	9-9-..-..	Y-16,750	3	Y-1,2,3,4,5,6,7,8	2
St. Louis, Mo	622, 236	1-..	2-4-3	Y-2	29-1-28-..	Y-..	5	Y-2,3,4,5,7,8	2,3
San Antonio, Tex	654, 153	3-5	1-2-1	None	8*-9-..-..	None	3	Y-1,2,5,6,7,8	----------
San Diego, Calif	696, 769	3-5	2-4-1	None	8-8-..-..	Y-5,000	3	Y-1,3,4,5,6,7,8	----------
San Francisco, Calif	715, 674	1-5	2-4-3	Y-1	11-11-..-..	Y-9,600	2	Y-1,2,4,5,7	3,4,13
Seattle, Wash	530, 831	2-5	2-4-3	Y-1	9-9-..-..	Y-17,000	3	Y-1,2,5,6,7	2,3,13
Washington, D.C	756, 510	1-1	4-4-3	Y-2	9-..-..-9	Y-7,500	5	Y-1,2,3,4,5,6,7,8	----------

TABLE 3/20.—FORM OF GOVERNMENT IN CITIES OVER 5,000: 1971—Continued

City	1970 population	Form of government charter or basic law	Mayor		Council				Other directly elected officials
			Selection, term, right to vote in council	Authority to veto, in what cases	Total, number elected—at large, by wards, other	Paid set salary annual salary (dollars)	Filing council vacancy	Council staff, other services	
250,000 to 500,000									
Akron, Ohio	275, 425	1-5	2-4-3	Y-2	13-3-10-..	Y-7,500	1	Y-1,2,4,5,7,8	----------
Atlanta, Ga	496, 973	2-5	2-4-3	Y-1	19-19-..-..	Y-7,200	1	N-2,4,7	----------
Austin, Tex	251, 808	3-5	2-2-1	None	6-6-..-..	Y-250	1	Y-1,2,5,7	----------
Birmingham, Ala	300, 910	1-6	2-4-3	Y-6	9-9-..-..	Y-4,800	5	Y-1,2,3,4,5,6,7,8	----------
Buffalo, N.Y	462, 768	1-5	2-4-3	Y-1	15-6-9-..	Y-13,500	3	Y-1,2,3,4,5,6,7,8	2
Cincinnati, Ohio	452, 524	3-5	1-2-1	None	8*-9-..-..	Y-8,000	3	Y-1,2,3,4,5,6,7,8	----------
El Paso, Tex	322, 261	1-5	2-2-2	Y-2	4-4-..-..	Y-4,800	3	Y-1,2,3,4,5,6,7,8	4
Fort Worth, Tex	393, 476	3-5	2-2-1	None	8-8-..-..	Y-520	3	N-2,3,4,5,6,7	----------
Honolulu, Hawaii	324, 871	1-1	2-4-3	Y-2,5	9-..-9-..	Y-14,400	1	Y-1,2,3,4,5,6,7,8	----------
Jersey City, N.J	260, 545	1-4	2-4-4	Y-2	9-3-6-..	Y-8,000	5	Y-1,2,3,4,5,6,7,8	----------
Minneapolis, Minn	434, 400	1-5	2-2-3	Y-2,4	13-..-13-..	Y-15,000	3	Y-1,2,3,4,5,6,7,8	2,3
Nashville-Davidson, Tenn	447, 877	1-1	..-..-..	..-..	41-..-..-..	Y-3,600	----	----------	----------
Newark, N.J	382, 417	1-4	2-4-3	Y-2	9-4-5-..	Y-10,000	1	Y-1,2,3,4,5,6,7,8	----------
Norfolk, Va	307, 951	3-1	1-2-1	None	6*-7-..-..	Y-4,800	3	N-2,4,5,7	3
Oakland, Calif	361, 561	3-5	2-4-1	Y-2	8-8-..-..	Y-3,600	3	Y-1,2,3,4,5,6,7	1
Oklahoma City, Okla	366, 481	3-5	2-4-1	..-..	8-..-8-..	Y-960	3	N-2,3,5,6,7,8	----------
Portland, Oreg	382, 619	4-1	2-4-1	None	4-4-..-..	Y-20,800	3	N-1,2,4,5,6,7,8	1,7
Rochester, N.Y	296, 233	3-5	1-2-1	None	9-5-4-..	Y-7,500	2	N-2,3,5,6,7,8	----------
Sacramento, Calif	254, 413	3-1	2-4-1	None	8-..-8-..	Y-1,200	3	Y-2,4,5,6,7,8	----------
St. Paul, Minn	309, 980	4-5	2-2-1	Y-1	6-6-..-..	Y-14,000	3	N-1,2,3,4,5,6,7,8	2
San Jose, Calif	445, 779	3-5	2-4-1	None	6*-7-..-..	Y-4,800	3	Y-1,2,5,7,8	----------
Toledo, Ohio	383, 818	3-5	2-2-1	None	8-8-..-..	Y-7,800	3	N-2,4,5,6,7,8	----------
Tucson, Ariz	262, 933	3-5	2-4-1	None	6-..-6-..	Y-2,400	3	Y-1,2,3,4,5,6,7,8	----------
Tulsa, Okla	331, 638	4-5	2-2-1	Y-2	4-4-..-..	Y-15,600	5	Y-1,5,7	1
Wichita, Kans	276, 554	3-3	1-1-1	None	4*-5-..-..	Y-5,400	3	N-2,3,4,5,6,7,8	----------
100,000 to 250,000									
Alexandria, Va	110, 938	3-..	2-3-1	None	6-6-..-..	Y-4,800	..	Y-1,2,5,6,8	3,13
Allentown, Pa	109, 527	3-4	2-4-3	Y-2	7-7-..-..	Y-2,100	3	Y-1,2,4,5,6,8	2,3
Amarillo, Tex	127, 010	3-5	2-2-1	Y-1	4*-5-..-..	Y-520	3	Y-1,2,3,4,5,6,7,8	----------
Anaheim, Calif	166, 701	3-5	1-1-1	None	4*-5-..-..	Y-4,800	3	N-2,4,5,7	----------
Baton Rouge, La	165, 963	1-1	2-4-3	Y-2	7-..-..-..	Y-3,600	1	N-4,5,6,7,8	----------
Beaumont, Tex	115, 919	3-5	2-2-1	None	5-5-..-..	Y-1,200	3	N-1,2,3,4,5,6,7,8	----------
Berkeley, Calif	116, 716	3-5	2-4-1	None	8-8-..-..	Y-900	3	Y-2,3,5,6,7	1
Camden, N.J	102, 551	1-3	2-4-3	Y-2	7-7-..-..	Y-5,000	3	Y-1,5,7,8	----------

Canton, Ohio	110, 053	1-2	2-4-3	Y-1	16-..-..-..	Y-3,600	3	Y-2,3,4,5,6,7,8	1,3,13
Cedar Rapids, Iowa	110, 642	4-5	2-2-1	Y-1	4-4-..-..	Y-17,500	3	Y-1,2,5,6,7,8	12
Charlotte, N.C	241, 178	3-1	2-2-2	None	7-7-..-..	Y-3,600	3	N-2,4,5,7,8	----------
Chattanooga, Tenn	119, 082	4-1	2-4-1	Y-2	4-4-..-..	Y-18,500	3	Y-1,2,3,4,5,7,8	----------
Colorado Springs, Colo	135, 060	3-5	1-2-1	None	8*-5-4-..	None	3	N-2,4,5,6,7,8	----------
Columbia, S.C	113, 542	3-1	2-4-1	None	4-4-..-..	Y-3,000	3	N-2,5,6,7,8	----------
Columbus, Ga	166, 565	3-6	..-4-2	None	10-..-..-..	Y-6,000	3	Y-2,3,4,5,6,7,8	----------
Corpus Christi, Tex	204, 525	3-5	2-2-1	Y-1	6*-3-4-..	Y-3,000	3	Y-2,4,5,6,7,8	----------
Dearborn, Mich	104, 199	1-5	2-3-3	Y-1	7-7-..-..	Y-2,000	3	N-1,2,3,4,5,6,7	3,5
Des Moines, Iowa	200,587	3-4	2-4-1	None	6-2-4-..	Y-3,000	3	Y-2,4,5,6,7,8	4
Duluth, Minn	100, 578	1-5	2-4-3	Y-1	9-4-5-..	None	3	Y-2,4,5,7,8	----------
Elizabeth, N.J	112, 054	1-4	2-4-2	Y-2	9-3-6-..	Y-5,500	3	N-1,5,6,7,8	----------
Erie, Pa	129, 231	2-4	2-4-4	Y-2	7-7-..-..	Y-3,900	3	N-2,5,6,7,8	2,3
Flint, Mich	193, 317	3-5	1-2-1	None	8*-..-9-..	None	--	N-5,6,7,8	----------
Fort Launderdale, Fla	139, 590	3-1	3-2-1	None	5-5-..-..	Y-3,600	1	N-1,2,3,4,5,6,7,8	----------
Fremont, Calif	100, 869	3-5	1-1-1	None	5-5-..-..	Y-3,600	3	N-2,3,4,5,6,7,8	----------
Fresno, Calif	165,972	3-5	2-4-1	None	7-7-..-..	Y-3,600	3	Y-1,2,3,5,6,7,8	----------
Garden Grove, Calif	122, 524	3-6	1-4-1	None	4-4-..-..	Y-3,600	--	N-4,5,6,8	----------
Gary, Ind	175, 415	1-2	2-4-3	Y-1	9-3-6-..	Y-3,600	3	Y-5,7	1,3,4,5
Glendale, Calif	132, 752	3-5	1-1-1	None	4*-5-..-..	None	3	N-5,6,7,8	3,5
Grand Rapids, Mich	197, 649	3-5	2-4-1	None	6-..-6-..	Y-1,200	3	Y-1,2,4,5,6,7	24
Greensboro, N.C	144, 076	3-1	1-2-1	None	6*-7-..-..	Y-3,600	3	Y-2,3,4,5,7,8	----------
Hammond, Ind	107, 790	1-2	2-4-3	Y-2,4	9-..-..-..	Y-4,200	3	Y-2,5,7,8	1,3,,5
Hartford, Conn	158, 017	3-1	2-2-3	Y-2	9-9-..-..	Y-4,000	3	Y-1,4,5,6,7,8	3
Hialeah, Fla	102, 297	1-1	2-2-3	Y-2,4	7-7-..-..	Y-..	3	N-1,3,4,5,6,7,8	----------
Huntington Beach, Calif	115, 960	3-1	1-1-1	None	6*-7-..-..	Y-2,100	3	N-2,3,4,5,6,7,8	3,5,13
Huntsville, Ala	137, 802	2-2	2-4-3	Y-2	5-5-..-..	Y-4,200	3	Y-1,5,7	----------
Independence, Mo	111, 662	3-5	2-4-1	None	5-..-..-..	Y-1,500	5	Y-1,2,3,4,5,6,7,8	----------
Jackson, Miss	153, 968	4-4	2-4-1	None	2*-3-..-..	Y-13,500	1	N-1,2,5,7,8	----------
Kansas City, Kans	168, 213	4-5	2-4-1	None	3-3-..-..	Y-..	3	Y-1,2,3,4,5,6,7,8	----------
Knoxville, Tenn	174, 587	2-5	2-4-2	None	9-3-6-..	Y-1,200	3	Y-1,2,3,4,5,7	----------
Las Vegas, Nev	125, 787	3-1	2-4-1	None	4-4-..-..	Y-6,000	3	Y-2,4,5,6,7,8	13
Lexington, Ky	108, 137	4-5	2-..-..	None	4-4-..-..	Y-6,000	3	Y-4,5,7,8	----------
Lincoln, Nebr	149, 518	1-5	2-4-3	Y-2	7-7-..-..	None	3	Y-1,4,5,6,7	----------
Little Rock, Ark	132, 483	3-1	1-2-1	None	6*-7-..-..	None	3	Y-2,3,4,5,6,7,8	----------
Livonia, Mich	110, 109	1-5	2-2-3	Y-1	7-7-..-..	Y-1,200	--	Y-1,5,7,8	----------
Lubbock, Tex	149, 101	3-5	2-2-1	None	4-4-..-..	Y-300	1	Y-2,3,5,6,7,8	----------
Madison, Wis	173, 258	1-5	2-2-2	Y-1	22-..-22-..	Y-1,800	3	Y-2,3,4,5,6,7,8	----------
Mobile, Ala	190, 026	4-1	2-1-1	None	2-..-..-..	Y-18,000	1	Y-1,2,3,5,6,7,8	----------
Montgomery, Ala	133, 386	4-3	2-4-1	None	2*-3-..-..	Y-15,000	1	Y-1,2,3,5,7,8	----------
New Bedford, Mass	101, 777	2-4	2-2-3	Y-1	11-5-6-..	Y-2,500	--	Y-5,6	4
New Haven, Conn	137, 707	2-1	2-2-..	Y-1	30-..-30-..	None	2	Y-2,3,4,5,6,7,8	3,5
Newport News, Va	138, 177	3-2	1-4-1	None	6*-7-..-..	Y-2,400	3	Y-1,2,5,6,7,8	3
*Pasadena, Calif	113, 327	3-5	1-1-1	None	7-7-..-..	Y-2,600	3	Y-2,5,6,7,8	----------
Peoria, Ill	126, 963	3-4	2-4-2	Y-1	10-..-10-..	Y-2,600	3	Y-1,2,3,4,5,6,7,8	3,4,5
Portsmouth, Va	110, 963	3-5	1-4-1	None	6*-7-..-..	Y-4,000	4	Y-2,3,4,5,6,7,8	----------
Providence, R.I	179, 213	1-1	2-4-3	Y-1	26-..-26-..	Y-3,000	1	Y-2,3,4,5,6,7,8	----------
*Riverside, Calif	140, 089	3-4	2-4-2	Y-2	7-..-7-..	None	3	Y-5,6,7,8	----------
Rockford, Ill	147, 370	1-5	2-4-2	Y-2,3,5	20-..-20-..	Y-2,600	2	N-2,4,5,6,7,8	3,5
St. Petersburg, Fla	216, 232	3-1	2-2-1	None	6*-7-..-..	Y-5,000	3	Y-2,4,5,6,7,8	----------

TABLE 3/20.—FORM OF GOVERNMENT IN CITIES OVER 5,000: 1971—Continued

City	1970 population	Form of government charter or basic law	Mayor: Selection, term, right to vote in council	Mayor: Authority to veto, in what cases	Council: Total, number elected—at large, by wards, other	Council: Paid set salary, annual salary (dollars)	Council: Filing council vacancy	Council: Council staff, other services	Other directly elected officials
100,000 to 250,000									
San Bernardino, Calif	104,251	1-5	2-2-1	Y-1	7-..-..-..	Y-600	1	Y-..	3,5,12,13
Santa Ana, Calif	156,601	3-1	1-2-1	None	6*-7-..-..	Y-1,500	3	Y-2,5,6,7,8	----
Savannah, Ga	118,349	3-1	2-4-1	Y-..	6-6-..-..	Y-2,400	3	Y-5,7	----
Spokane, Wash	170,516	3-5	2T-1	None	6-6-..-..	Y-2,400	3	Y-1,2,3,4,5,6,7,8	----
Springfield, Mass	163,905	2-4	2-2-3	Y-1	9-9-..-..	Y-2,500	--	Y-5,7	----
Stockton, Calif	107,644	3-1	1-1-1	None	9-9-..-..	None	3	Y-2,3,4,5,6,7,8	----
Syracuse, N.Y	197,208	2-5	2-4-3	Y-1	10-5-5-..	Y-6,000	3	Y-1,2,3,4,5,7	1
Tacoma, Wash	154,581	3-3	2-2-1	None	8*-9-..-..	Y-1,200	3	Y-4,5,7	----
Topeka, Kans	125,011	4-4	2-2-1	None	4*-5-..-..	Y-12,500	3	N-1,2,4,5,6,7,8	----
Torrance, Calif	134,584	3-5	2-4-1	None	6-6-..-..	Y-1,200	1	Y-1,2,5,6,7,8	3,5
Trenton, N.J	104,638	1-4	2-4-2	Y-2	7-3-4-..	Y-5,000	3	N-1,2,4,5,7,8	----
Virginia Beach, Va	172,106	3-1	1-4-1	None	10*-4-7-..	Y-4,800	3	N-2,4,5,6,8	3
Waterbury, Conn	108,033	2-..	2-2-3	Y-1	15-15-..-..	Y-1,000	2	Y-1,2,5,6,7,8	2,3,5
Winston-Salem, N.C	132,913	3-1	2-4-2	None	8-..-8-..	Y-3,600	3	N-4,5,6,7	----
Worcester, Mass	176,572	3-5	1-2-1	None	9-9-..-..	Y-5,000	5	N-1	----
Yonkers, N.Y	204,370	3-1	2-2-2	None	12-..-12-..	Y-7,500	2	N-5	----
Youngstown, Ohio	139,788	2-5	..-2-3	Y-1	7-..-7-..	Y-600	5	Y-1,2,3,4,5,6,7,8	1,4
50,000 to 100,000									
Abilene, Tex	89,653	3-5	2-3-1	None	6-6-..-..	Y-1	1	N-2,5,7	----
Abington tp, Pa	62,899	4-3	..-..-..	..-..	15-..-15-..	Y-1,800	3	N-2,4,5,6,7,8	1,3
Alameda, Calif	70,968	3-..	2-4-1	None	4-4-..-..	Y-480	3	N-2,4,5,6,7,8	1,3,4
Albany, Ga	72,623	3-2	2-2-1	None	6-6-..-..	Y-3,000	1	..-..	----
Alhambra, Calif	62,125	3-5	1-1-1	None	4*-5-..-..	Y-600	3	..-1,2,3,4,5,6,7,8	13
Altoona, Pa	62,900	2-3	2-4-1	None	4*-5-..-..	Y-9,000	3	Y-1,2,4,5,6,7,8	2,3,7,12
Ann Arbor, Mich	99,797	3-5	2-2-1	Y-1	10-..-10-..	None	3	N-2,4,5,6,7,8	----
Appleton, Wis	57,143	2-5	2-4-2	Y-1	20-..-20-..	Y-1,200	1	N-5,6,7	3,4,5,13
Arlington t, Mass	53,524	7-..	..-..-..	..-..	..-..-..-..	..-..	--	..-..	----
Arlington, Tex	90,643	3-5	2-2-1	None	6-6-..-..	Y-120	1	N-5,6,7,8	----
Arlington Hts. v, Ill	64,884	3-5	2-4-1	Y-4,5,6	6-6-..-..	None	--	N-4,5,6,7,8	5
Asheville, N.C	57,681	3-1	1-2-1	None	6*-7-..-..	Y-900	3	N-5,6	----
Augusta, Ga	59,864	2-2	2-3-2	Y-1	16-..-..-..	Y-1,800	1	N-2,4,5,6,8	----
Aurora, Colo	74,974	3-5	2-2-1	None	8-4-4-..	Y-2,400	3	N-2,3,4,5,6,7,8	----
Bellevue, Wash	61,102	3-5	1-2-1	None	6*-7-..-..	Y-2,400	3	N-4,5,7,8	----
Bellflower, Calif	51,454	3-2	1-1-1	None	5-5-..-..	Y-3,000	3	N-1,5,6,7,8	----

Berwyn, Ill	52, 502	2-2	2-4-2	Y-2,3,4,5	8-..9..-8-..	Y-3,900	2	Y-4,5,6,7	1,3,5
Bethlehem, Pa	72, 686	1-4	2-4-3	Y-2	7-7-..-..	Y-2,400	3	Y-1,2,3,4,5,6,7,8	2,3
Binghamton, N.Y	64, 123	2-1	2-4-3	Y-2	9-..-9-..	Y-3,000	3	N-4,5,6,7,8	----------
Bloomfield t, N.J	52, 029	1-1	2-3-1	None	6-3-3-..	Y-4,000	2	N-2,5,6,7,8	----------
Bloomington, Minn	81, 970	3-5	2-2-1	None	6-6-..-..	Y-3,000	3	Y-1,4,5,7	----------
Boulder, Colo	66, 870	3-5	1-2-1	None	9-9-..-..	None	3	Y-2,3,4,5'6,7,8	----------
Bristol, Conn	55, 487	1-5	2-2-1	None	6-6-..-..	Y-1,200	1	N-2,5,6,7,8	3,5
Bristol tp, Pa	67, 498	3-3	..-..-..	..-..	10-..-10-..	Y-1,000	3	N-4,5,6,7,8	3
Brownsville, Tex	52, 522	3-5	2-2-1	None	4-4-..-..	Y-48	3	Y-5,6,7,8	----------
Burbank, Calif	88, 871	3-1	1-1-1	None	4*-5-..-..	None	3	Y-1,2,4,5,6,7,8	3,5
Carson, Calif	71, 150	3-2	1-1-1	None	5-5-..-..	Y-3,000	3	Y-1,2,4,5,6,7,8	3,5
Champaign, Ill	56, 532	3-2	2-4-1	None	6-..-..-..	Y-900	1	N-2,3,4,5,6,7,8	----------
Chesapeake, Va	89, 580	3-1	1-2-1	None	8*-9-..-..	Y-2,400	1	Y-2,4,5,6,7,8	3
Chester, Pa	56, 331	2-6	2-4-1	None	4-4-..-..	Y-14,000	3	Y-1,2,4,5,7,8	2,3
Clearwater, Fla	52, 074	3-..	2-2-1	None	4*-5-..-..	Y-2,400	3	Y-1,2,4,5,6,7,8	----------
Clifton, N.J	82, 437	3-1	1-4-1	None	7-7-..-..	Y-4,000	3	N-2,5,6,7	----------
Columbia, Mo	58, 804	3-5	2-2-1	None	4*-1-4-..	None	--	N-2,4,5,6,7,8	----------
Compton, Calif	78, 611	3-3	2-4-1	None	4-4-..-..	Y-3,600	3	N-5,6,7,8	3,5,13
Concord, Calif	85, 164	3-6	1-2-1	None	4*-5-..-..	Y-3,600	--	Y-2,3,4,5,6,7,8	3,5
Corvallis, Oreg	50, 860	3-5	2-4-2	Y-2	9-..-9-..	None	3	N-2,3,4,5,6,7	----------
Costa Mesa, Calif	72, 660	3-5	1-2-1	None	4*-5-..-..	Y-3,000	3	Y-2,3,4,5,6,7,8	----------
Council Bluffs, Iowa	60, 348	3-2	1-1-1	None	4-4-..-..	Y-300	3	Y-2,4,5,7,8	----------
Covington, Ky	52, 535	3-3	2-4-1	None	4-4-..-..	Y-6,000	--	..-4,5,7	----------
Cranston, R.I	73, 037	2-5	2-4-3	None	9-3-6-..	Y-3,000	1	N-5,7	----------
Daly City, Calif	66, 922	3-5	1-..-1	None	5-5-..-..	Y-3,000	3	N-1,2,5,6,7,8	3,5
Danbury, Conn	50, 781	2-5	2-2-2	Y-1,4	21-..-..-..	None	3	Y-1,2,3,4,5,6,7,8	3,5
Davenport, Iowa	98, 469	1-1	2-2-2	Y-1	10-2-8-..	Y-1,800	--	Y-1,2,3,4,5,6,7,8	3,5
Dearborn Heights, Mich	80, 069	1-5	2-4-3	Y-1	7-7-..-..	Y-2,500	3	N-1,2,4,5,7,8	3,5
Decatur, Ill	90, 397	3-5	2-4-1	None	6-6-..-..	Y-960	3	N-5,6,7,8	----------
Des Plaines, Ill	57, 239	1-4	2-4-4	Y-2	16-..-16-..	Y-1,800	2	N-2,3,5,6,8	3,5
Dubuque, Iowa	62, 309	3-4	1-1-1	Y-1	4*-5..-..	Y-1,200	3	N-2,5,6,7,8	----------
Dunkirk, N.Y	63, 240	2-1	2-2-3	Y-1	5-5-..-..	Y-2,200	2	Y-2,3,4,7	3,4,13
Durham, N.C	98, 538	3-5	2-2-1	None	11*-6-6-..	Y-1,680	3	N-2,3,4,5,6,7,8	----------
East Hartford, Conn	57, 583	1-5	2-2-3	Y-2,4,6	9-9-..-..	None	3	Y-1,5,6,7,8	3
East Orange, N.J	75, 471	2-1	2-4-3	Y-..	10-..-10-..	Y-4,500	7	Y-1,2,3,4,5,6,7,8	----------
East St. Louis, Ill	69, 996	1-2	2-4-1	None	4-4-..-..	Y-15,000	3	Y-1,5,6,7,8	4
El Cajon, Calif	52, 273	3-2	2-4-1	None	4-4-..-..	Y-3,000	3	N-4,5,6,7	3,5
Elgin, Ill	55, 691	3-5	2-4-1	None	6-6-..-..	Y-1,200	3	N-2,3,5,6,7,8	----------
El Monte, Calif	69, 837	3-..	1-2-1	None	4*-5-..-..	Y-3,000	1	N-1,2,3,4,5,6,7,8	3,5
Eugene, Oreg	76, 346	3-5	2-4-2	Y-2	8-..-8-..	None	3	N-2,3,4,5,6,7,8	----------
Evanston, Ill	79, 808	3-4	2-4-2	Y-1	18-..-18-..	Y-2,200	1	N-2,4,5,6,7,8	3,5
Everrett, Wash	53, 622	4-5	2-4-3	Y-2	7-7-..-..	Y-3,600	3	Y-1,2,4,5,7,8	----------
Fall River, Mass	96, 898	1-4	2-4-3	Y-1	9-9-..-..	Y-1,800	5	Y-2,3,4,5,7,8	----------
Fargo, N. Dak	53, 365	4-5	2-4-1	None	4*-5-..-..	Y-4,800	1	Y-1,2,3,4,5,7,8	----------
Fayetteville, N.C	53, 510	3-2	2-2-1	None	6-6-..-..	Y-960	4	Y-2,3,4,5,6,7,8	----------
Florissant, Mo	65, 908	2-5	2-4-3	Y-2	9-..-9-..	Y-1, 800	--	N-2,4,5,7,8	----------
Fort Smith, Ark	62, 802	3-1	2-4-3	Y-1,6	8*-3-4-..	Y-1,000	1	Y-1,2,4,5,6,7,8	----------
Fullerton, Calif	85, 826	3-2	1-2-1	None	4*-5-..-..	Y-3,600	--	Y-1,2,3,5,6,7,8	5
Gadsden, Ala	53, 928	4-3	2-4-1	None	3-3-..-..	Y-15,000	3	Y-1,2,4,5,7	----------

TABLE 3/20.—FORM OF GOVERNMENT IN CITIES OVER 5,000: 1971—Continued

City	1970 population	Form of government charter or basic law	Mayor		Council				Other directly elected officials
			Selection, term, right to vote in council	Authority to veto, in what cases	Total, number elected—at large, by wards, other	Paid set salary, annual salary (dollars)	Filing council vacancy	Council staff, other services	
100,000 to 250,000									
Galveston, Tex.	61, 809	3-5	2-2-1	None	6-6-..-..	None	3	N, 1, 5, 6, 7, 8	----------------
Gainesville, Fla.	64, 510	3-1	1-3-1	None	5-5-..-..	Y-3,600	1	..-2,4,5,6,7,8	----------------
Garland, Tex.	81, 437	3-5	2-2-1	None	8-8-..-..	None	3	Y-2,3,4,5,6,7,8	----------------
Grand Prairie, Tex.	50, 904	3-5	2-2-1	None	5-..-..	Y-300	3	N-2,4,5,6,7,8	----------------
Greenville, S.C.	61, 208	3-..	2-4-2	None	6-6-..-..	Y-2,400	1	N-5,6,7,8	----------------
Harrisburg, Pa.	68, 061	1-4	2-4-2	Y-2	7-7-..-..	Y-2,100	3	Y-1,2,3,4,5,6,7,8	2,3
Haverford tp, Pa.	55, 132	4-3	1-..-..	..-..	9-..-9-..	Y-2,400	3	N-5,6,7,8	2,3
Huntington, W. Va.	74, 315	3-5	1-1-1	None	7-7-..-..	Y-1,200	3	Y-1,5,6,7,8	----------------
Inglewood, Calif.	89, 985	3-5	2-4-1	None	4-..-4-..	Y-3,600	3	..-1,5,6,7,8	3,5
Irondequioit t, N.Y.	63, 675	6-5	2-2-1	None	4-5-..-..	Y-5,000	3	Y-5,7,8	----------------
Irving, Tex.	97, 260	3-5	2-2-1	None	8*-4-5-..	Y-1,200	3	N-4,5,6,7,8	----------------
Irvington t, N.J.	59, 743	1-4	2-4-3	Y-2	7-3-4-..	Y-4,000	3	N-1,2,3,4,5,6,7,8	----------------
Joliet, Ill.	80, 378	3-3	2-4-1	None	6-6-..-..	Y-2,500	1	N-2,4,5,6,7,8	----------------
Kenosha, Wis.	78, 805	1-5	2-4-2	Y-1	18-..-18-..	Y-1,200	3	N-2,3,4,5,6,7,8	----------------
Kettering, Ohio	69, 599	3-5	1-2-1	None	6*-3-4-..	Y-2,400	3	N-5,8	----------------
La Crosse, Wis.	51, 153	2-1	2-2-2	Y-1	21-..-21-..	Y-1,500	3	N-4,5,6,7,8	3,5
Lake Charles, La.	77, 998	1-5	2-4-3	Y-2	7-7-..-..	Y-3,000	1	Y-4,5,7	4
Lakewood, Calif.	82, 973	3-3	1-2-1	None	5-5-..-..	Y-3,600	3	Y-1,2,3,4,5,6,7,8	----------------
Lakewood, Ohio	70, 173	1-5	2-4-3	Y-2	7-3-4..	Y-4,000	3	Y-1,2,3,4,5,6,7,8	12
Lancaster, Pa.	57, 690	1-4	2-4-2	Y-2	7-7-..-..	Y-1,800	3	Y-1,2,3,4,5,7,8	2,3
Lawrence, Mass.	66, 915	4-1	2-2-1	None	5-5-..-..	Y-12,500	1	N-1,5,7,8	----------------
Lawton, Okla.	74, 470	1-5	2-2-2	None	8-..-8-..	Y-3,000	--	Y-1,2,3,5,7,8	3,4,5,10
Lima, Ohio	53, 734	2-5	2-4-3	Y-2,3,6	8-1-7-..	Y-2,000	3	Y-1,2,4,5,6,7,8	1,13
Lowell, Mass.	94, 239	3-2	1-2-1	None	8*-9-..-..	Y-4,000	5	N-5	----------------
Lower Merion tp, Pa.	63, 392	3-3	..-..-..	..-..	14-..-14-..	Y-1,800	3	N-4,5,6,7,8	3
Malden, Mass.	56, 127	2-1	2-2-3	Y-1	11-3-8-..	Y-4,500	1	Y-5,7,8	----------------
Mansfield, Ohio	55, 047	1-2	2-4-3	Y-2	10-3-7-..	Y-1,800	3	Y-4,7	1,3,13
Medford, Mass.	64, 397	3-4	1-..-1	None	6*-7-..-..	Y-5,000	3	N-5	----------------
Mesa, Ariz.	62, 853	3-5	2-2-1	None	6-6-..-..	Y-1,200	2	N-5,6,7,8	----------------
Mesquite, Tex.	55, 131	3-5	2-2-1	None	6-2-4-..	Y-600	3	N-5,8	----------------
Miami Beach, Fla.	87, 072	3-1	2-2-1	None	6-6-..-..	Y-6,000	3	Y-2,5,7,8	----------------
Middletown tp, N.J.	54, 623	6-2	1-1-1	None	4*-5-..-..	Y-3,500	3	..-2,6,7,8	5
Midland, Tex.	59, 463	3-5	2-2-2	None	5-5-..-..	Y-300	3	N-2,4,5,6,7	----------------
Milford, Conn.	50, 858	1-1	2-2-3	None	15-..-15-..	None	3	Y-5,6,7	5
Modesto, Calif.	61, 712	3-1	2-4-1	None	6-6-..-..	None	3	N-2,5,6,7,8	----------------
Monroe, La.	56, 374	4-1	2-4-1	None	2-..-..-..	Y-11,000	5	Y-1,2,4,5,6,7,8	----------------

Mount Vernon, N.Y	72, 778	2-1	2-4-3	Y-2	5-5-..-..	Y-7,000	3	Y-2,3,4,5,6,7,8	2
Mountain View, Calif	51, 092	3-1	1-1-1	None	6-6-..-..	Y-3,000	3	N-1,2,3,4,5,6,7,8	--------
Muncie, Ind	69, 080	2-3	2-4-3	Y-1	9-3-6-..	Y-2,400	3	Y-2,4,7,8	1,3,4,5
New Britain, Conn	83, 441	7-1	2-2-2	Y-1	15-5-10-..	Y-750	3	Y-5 7,8	3,5
New Rochelle, N.Y	75, 385	3-1	2-4-1	None	4-4-..-..	Y-8,000	3	N-2,4,5,6,7	--------
Newton, Mass	91, 066	2-1	2-2-3	Y-1	24-16-8-..	None	1	N-2,3,4,5,6,7,8	--------
Niagara Falls, N.Y	85, 615	3-5	2-4-1	None	4-4-..-..	Y-6,000	3	N-1,5,6,7,8	--------
Norman, Okla	52, 117	3-5	2-2-1	None	6-6-..-..	Y-300	3	N-2,3,4,5,6,7,8	3
Norwalk, Calif	91, 827	3-2	1-1-1	None	4*-5-..-..	Y-3,600	3	N-1,2,3,4,5,6,7,8	--------
Norwalk, Conn	79, 113	2-5	2-2-2	Y-1	15-5-10-..	Y-600	3	N-2,4,5,6,7,8	3
Oak Park v, Ill	62, 511	3-5	4-[illegible]-1	..-..	6*-7-..-..	Y-600	1	Y-4,5,6,7,8	1,5
Odessa, Tex	78, 380	3-5	2-2-2	None	5-5-..-..	Y-450	3	N-1,2,4,5,6,7,8	--------
Ogden, Utah	69, 478	3-..	1-2-1	None	7-3-4-..	Y-300	3	Y-1,2,5,6,7,8	--------
Ontario, Calif	64, 118	3-..	2-4-1	None	4-4-..-..	Y-3,000	5	Y-2,5,6,7	3,5
Orlando, Fla	99, 006	2-1	2-4-1	Y-2	4*-5-..-..	Y-6,200	1	Y-1,2,3,4,5,6,7,8	--------
Oshkosh, Wis	53, 221	3-5	..-..-..	..-..	7-7-..-..	Y-900	3	N-2,4,5,6,7,8	--------
Overland Park, Kans	76, 623	3-5	2-2-2	Y-1	10-..-10-..	Y-3,000	3	N-1,2,3,4,5,6,7,8	--------
Oxnard, Calif	71, 225	1-2	1-2-1	None	4-4-..-..	Y-3,000	4	N-1,2,3,4,5,6,7,8	3,5
Pasadena, Tex	89, 277	2-5	2-4-1	Y-1	6-2-4-..	Y-3,600	3	Y-1,2,4,5,6,7,8	--------
Pawtucket, R.I	76, 984	2-5	2-2-3	Y-2	9-3-6-..	Y-1,800	1	N-2,4,5,6,7	--------
Penn Hills tp, Pa	62, 886	3-2	..-..-..	..-..	9-..-9-..	Y-2,400	3	..-5,7	3
Pico Rivera, Calif	54, 170	3-2	1-1-1	None	5-5-..-..	Y-3,000	3	Y-1,2,3,4,5,6,7,8	--------
Pine Bluff, Ark	57, 389	2-2	2-4-2	Y-2	8-8-..-..	Y-2,100	3	N-4,7	3,5,13
Pittsfield, Mass	57, 020	2-1	2-2-3	Y-1	11-4-7-..	Y-1,000	1	Y-5	5
Pontiac, Mich	85, 279	3-5	1-2-1	None	6-..-..-..	Y-1,300	3	N-5,6,7,8	--------
Port Arthur, Tex	57, 371	3-5	2-2-1	None	6-6-..-..	Y-1,200	3	..-1,5,6,7,8	--------
Portland, Maine	65, 116	3-1	1-1-1	None	9-3-6-..	Y-2,400	1	N-1,2,3,4,5,6,7,8	--------
Provo, Utah	53, 131	4-3	2-4-1	None	2-2-..-..	Y-13,000	3	Y-1,2,4,5,7,8	1
Pueblo, Colo	97, 453	3-5	1-2-1	None	7-3-4-..	Y-1,200	3	Y-1,2,3,4,5,6,7,8	--------
Quincy, Mass	87, 966	2-2	2-2-3	Y-1	9-3-6-..	Y-1,500	3	Y-1,5,6,7	--------
Racine, Wis	95, 162	2-5	2-2-2	Y-1	18-..-18-..	Y-2,750	3	N-4,5,6,7,8	--------
Reading, Pa	87, 643	4-4	2-4-1	None	4-4-..-..	Y-14,000	3	Y-1,5,7,8	2,3,7,12
Redwood City, Calif	55, 686	3-5	1-3-1	None	6*-7-..-..	Y-1,800	3	N-1,4,5,6,7,8	--------
Richardson, Tex	53, 980	3-5	1-2-1	None	6*-3-4-..	Y-520	3	N-5,6,7	--------
Richmond, Calif	79, 043	3-5	1-1-1	None	8*-9-..-..	Y-600	3	N-2,3,4,5,6,7,8	--------
Roanoke, Va	92, 115	3-..	2-4-1	None	6*-7-..-..	Y-3,000	3	Y-2,5,6,7	3
Rochester, Minn	53, 766	1-5	2-2-3	Y-2,6	7-1-6-..	Y-3,000	3	N-2,5,6,7	--------
Rock Island, Ill	50, 166	3-4	2-4-1	None	6-6-..-..	Y-1,800	2	N-2,4,5,7,8	2,3,5
Rome, N.Y	50, 148	2-5	2-4-3	Y-2	7-..-..-..	Y-2,200	2	Y-1,2,3,4,5,6,7,8	--------
Roseville, Mich	60, 529	3-5	2-2-1	None	6-6-..-..	Y-1,500	3	N-2,3.5,7,8	3,5
Royal Oak, Mich	85, 499	3-5	2-2-1	None	6-6-..-..	Y-1,040	3	N-2,3,4,5,6,7,8	--------
Saginaw, Mich	91, 849	3-5	1-2-1	None	8*-9-..-..	None	3	N-5,6,7,8	--------
Salem, Oreg	68, 296	3-2	2-2-1	None	8-..-8-..	None	3	N-2,3,4,5,6,7,8	--------
Salinas, Calif	58, 896	3-5	1-2-1	None	4*-5-..-..	Y-1,200	3	N-2,3,4,5,6,7,8	--------
San Angelo, Tex	63, 884	3-5	2-2-1	None	6-6-..-..	Y-500	..	..-2,5,6,8	10
San Leandro, Calif	68, 698	3-5	2-4-1	None	6-6-..-..	None	3	N-5,6,7,8	--------
San Mateo, Calif	78, 991	3-5	1-1-1	None	4*-5-..-..	Y-1,200	3	N-4,5,6,7,8	--------
Santa Barbara, Calif	70, 215	3-1	2-4-1	None	6-6-..-..	Y-3,000	3	..-1,3,5,6,7	--------

TABLE 3/20.—FORM OF GOVERNMENT IN CITIES OVER 5,000: 1971—Continued

City	1970 population	Form of government charter or basic law	Mayor		Council				Other directly elected officials
			Selection, term, right to vote in council	Authority to veto, in what cases	Total, number elected—at large, by wards, other	Paid set salary, annual salary (dollars)	Filing council vacancy	Council staff, other services	
50,000 to 100,000									
Santa Clara, Calif	87, 717	3-5	2-4-1	None	7-7-..-..	Y-2,400	3	Y-1,5,7,8	5,10
Santa Monica, Calif	88, 289	3-5	1-..-1	None	7-7-..-..	..-..	3	Y-1,5	----------------
Schenectady, N.Y	77, 859	3-5	2-4-1	None	6-6-..-..	Y-4,000	3	Y-5,6,7,8	----------------
Scottsdale, Ariz	67, 823	3-5	2-4-1	None	N6-6-..-..	Y-3,600	3	N-2,3,4,5,6,7,8	----------------
Sioux City, Iowa	85, 925	3-2	1-2-1	None	4*-5-..-..	Y-1,200	3	N-2,3,4,5,6,7,8	----------------
Sioux Falls, S. Dak	72, 488	4-..	2-5-1	None	2*-3-..-..	Y-15,780	1	..-..	----------------
Skokie v, Ill	68, 627	3-4	2-4-1	Y-2	6-6-..-..	Y-3,900	3	N-5,6,7,8	5
Somerville, Mass	88, 779	1-1	2-2-3	Y-6	11-4-7-..	Y-..	1	Y-1,5	4
South Gate, Calif	56, 909	1-6	1-1-1	None	4*-5-..-..	Y-3,000	5	Y-1,5,7,8	3,5
Southfield, Mich	69, 285	3-5	2-2-3	Y-1	7-7-..-..	None	3	Y-2,5,6,7,8	3,5
Springfield, Ill	91, 753	1-3	2-4-1	None	4-4-..-..	Y-26,000	3	Y-1,2,3,4,5,6,7,8	----------------
Springfield, Ohio	81, 926	3-5	1-2-1	None	4-4-..-..	Y-2,500	3	Y-2,4,5,6,7,8	----------------
Sunnyvale, Calif	95, 408	3-5	1-4-1	None	6*-7-..-..	Y-2,400	3	N-5,7	----------------
Tallahassee, Fla	71, 897	3-5	1-1-1	None	4*-5-..-..	Y-3,000	3	N-5,6,7,8	----------------
Tempe, Ariz	62, 907	3-5	2-2-1	None	6-6-..-..	Y-1,800	3	N-2,5,6,7,8	----------------
Troy, N.Y	62, 918	3-5	1-4-1	None	7-..-7-..	Y-2,600	4	Y-2,3,4,5,6,7,8	----------------
Tuscaloosa, Ala	65, 773	4-3	2-4-1	None	2*-3-..-..	Y-7,800	1	Y-1,2,3,4,5,6,7,8	----------------
Union t, N.Y	64, 490	..-6	..-..-..	..-..	5-..-..-..	Y-3,500	..	N-1,5,7,8	5
Utica, N.Y	91, 611	1-5	2-2-2	Y-2	9-..-9-..	Y-4,500	2	Y-1,2,3,5,6,7,8	2,3
Ventura, Calif	55, 797	3-5	1-2-1	None	7-7-..-..	Y-3,000	3	Y-1,2,3,4,5,6,7,8	----------------
Waltham, Mass	61, 582	2-4	2-2-3	Y-1	15-6-9-..	Y-20	1	Y-5,7	----------------
Warwick, R.I	83, 694	2-2	2-2-3	Y-1	9-..-9-..	Y-3,000	1	Y-4,5,7,8	----------------
Waukegan, Ill	65, 269	2-1	..-4-2	None	17-1-16-..	Y-2,600	..	N-2,5,7,8	3,5
Wauwatosa, Wis	58, 676	1-3	2-4-2	Y-1	16-..-16-..	Y-3,000	3	Y-2,3,4,5,6,7,8	----------------
West Allis, Wis	71, 723	1-2	2-4-2	Y-1	10-..-10-..	Y-3,900	1	..-4	3,4,5,13
West Covina, Calif	68, 034	3-6	1-..-1	None	4*-5-..-..	Y-3,000	3	N-1,2,3,4,5,6,7,8	3,5
West Hartford t, Conn	68, 031	3-5	1-2-1	None	9-9-..-..	None	3	Y-2,5,6,7	5
West Palm Beach, Fla	57, 375	3-1	1-1-1	None	5-5-..-..	Y-5,200	3	Y-1,2,3,4,5,6,7,8	10
Westminster, Calif	59. 865	3-4	1-4-1	None	4*-5-..-..	Y-3,000	3	N-1,2,3,4,5,7,8	4
White Plains, N.Y	50, 220	1-1	2-2-1	None	6-6-..-..	Y-5,000	3	N-2,3,4,5,6,7,8	----------------
Whittier, Calif	72, 863	3-1	1-2-1	None	4*-5-..-..	None	3	N-5,6,7,8	----------------
Woodbridge tp, N.J	98, 944	1-4	2-4-3	Y-2	9-4-5-..	Y-4,000	3	Y-2,3,4,5,6,7,8	----------------
Yankton, S. Dak	73, 25)	3-4	1-1-1	None	8*-9-..-..	Y-240	1	N-5,8	----------------

KEY TO TABLE DATA

Form of government:
- 1—Mayor-council (with chief administrative officer).
- 2—Mayor-council (without chief administrative officer).
- 3—Council-manager.
- 4—Commission.
- 5—Town meeting (with professional management).
- 6—Town meeting (without professional management).
- 7—Representative town meeting (with professional management).
- 8—Representative town meeting (without professional management).

Charter or basic law:
- 1—Unique charter (special act of the legislature).
- 2—Uniform charter (general act of State legislature prescribing a common form of government for all municipalities).
- 3—Classification charter (general act providing different forms of government for municipalities classified by population).
- 4—Optional charter (general act setting forth alternative plans and vesting a choice in the municipality).
- 5—Home rule (power of municipal corporation to frame, adopt, and amend a charter for its government and to exercise all powers of local self-government subject to state constitution and general laws).
- 6—Other.

Selection of mayor:
- 1—Council selects him from its own members.
- 2—People elect mayor directly.
- 3—Councilman receiving most votes in general election.
- 4—Other.

Right to vote:
- 1—On all issues.
- 2—Only in a tie.
- 3—Never votes.
- 4—Other.

Mayor's veto power:
- 1—All actions of council.
- 2—Ordinances only.
- 3—Specific sections of ordinances.
- 4—Appropriations only.
- 5—Specific sections of appropriations.
- 6—Other.

Filling council vacancy:
- 1—Special election.
- 2—Appointment by mayor.
- 3—Appointment by council.
- 4—Position not filled until next election.
- 5—Other.

Services provided council:
- 1—Office space.
- 2—Research assistance.
- 3—Reference library service.
- 4—Bill drafting service.
- 5—Meeting agendas and minutes.
- 6—Written committee reports.
- 7—Legal advice.
- 8—Copies of administrative actions.

Other directly elected officials:
- 1—Auditor or board of auditors.
- 2—Controller.
- 3—Treasurer.
- 4—City assessor or board of city assessors.
- 5—City clerk or secretary.
- 6—Street superintendent.
- 7—Public works director.
- 8—Planning director.
- 9—City engineer.
- 10—Police chief.
- 11—Fire chief.
- 12—Public safety director.
- 13—City attorney.
- 14—Health officer.
- 15—Chief personnel officer.
- 16—Director of recreation.
- 17—Librarian.
- 18—Superintendent of schools.

COMMENT SUBMITTED TO JUSTICE DEPARTMENT

OFFICE OF CIVIL RIGHTS
VOTING RIGHTS SECTION

OBJECTING TO REAPPORTIONMENT PLAN OF
LOUISIANA HOUSE OF REPRESENTATIVES

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6. LAFAYETTE PLANS, CORRESPONDENCE AND CLIPPINGS

I. INTRODUCTION

The Louisiana plan to reapportion the State House of Representatives is another in a long history of attempts to block the voting rights of its black citizens.

Both the effect and the intention of the legislative redistricting are to dilute the political influence of black citizens of Louisiana.

This objection is submitted by black legislators of Louisiana as well as others who are affected by the changes proposed. Representatives Bajoie, Jackson and Johnson are members of the Louisiana House of Representatives. Barbara Major is Chairperson of the Survival Coalition. The Survival Coalition is a state-wide grassroots organization of low and moderate income people.

This comment outlines several reasons why the Justice Department should object to the reapportionment of the Louisiana House of Representatives.

The State of Louisiana is unable to shoulder its burden of proving that the challenged plan fairly reflects the strength of minority voting power as it presently exists in this state.

II. SUMMARY

In several places in Louisiana, where there are growing populations of black citizens, the Louisiana legislature carved up the new state representative districts so that black populations centers would be diluted.

In New Orleans, despite a change of the City's population from 45% to 55% black, the state legislature reduced majority black population districts from 11 to 7 and increased white majority districts from 7 to 8.

Statewide, black majority districts decreased from 17 to 14.

In other areas of the state districts were carved in such a way as to avoid leaving a black population center intact. In several instances historic patterns of discrimination continued to keep clear black majority population districts from emerging.

Alternative plans proposed to the legislature were in line with the population trends and developments in Louisiana. One such plan is attached. Additionally, a computer-drawn plan is submitted with much smaller deviations than are in the legislature's enactment and many more black majority districts.

III. LOUISIANA - HISTORY OF RACIAL DISCRIMINATION IN VOTING RIGHTS

A. INTRODUCTION

Ever since Louisiana became a state, on April 30, 1812, its government has had a history of making decisions that were racially discriminatory and furthered the institution of segregation. Time and again Louisiana has attempted to block and frustrate the quest for full participation in the political, social, and economic systems of the State.

This section of this objection will briefly sketch the context in which this latest action by Louisiana should be evaluated.

B. OVERALL PICTURE OF DISCRIMINATION IN LOUISIANA

Louisiana's first Constitution, adopted in 1812, stipulated that voting was restricted to "free white male" members of the population. (Article II, Section 8). Free persons of color enjoyed no political rights whatsoever, and slaves were denied even the opportunity to learn to read and write.

Not content with this, the Louisiana legislature in 1842 prohibited any free black persons from coming into the state. Act 123 of the 1842 Louisiana Acts provided that any "free Negroe" who came into Louisiana would be immediately jailed until they could be sent out of the state. Act 315 of the 1852 Louisiana legislature demanded that any slaveowner who wished to emancipate his slaves had to put up the expenses for shipping the freed slave to Africa. And finally in 1857 the legislature in Act 69 prohibited emancipation all together.

After the Civil War, slavery was abolished by the 1864 Constitutional Convention. Black citizens got full citizenship and the right to vote.

However, once the federal presence was removed from the state, the barriers began again to be erected.

The 1890 legislature passed Act III which provided for "separate but equal" accomodations in rail service. It was under this act that Homer Adolph Plessy was arrested on June 7, 1982. His conviction was upheld in the landmark case of Plessy v. Ferguson, 163 U.S. 537 (1896) and separate but equal was the law of the land until 1954.

C. VOTING DISCRIMINATION IN LOUISIANA

Just prior to Homer Plessy's challenge to "separate but equal" rail service, Louisiana was moving to deny black citizens the political advances made during Reconstruction.

In 1898, a Constitutional Convention met to create a "White Supremacy Constitution."[1] The convention set up strict literacy and property prerequisites to registration for voting that would limit black registration. The convention then invented a "grandfather clause," which exempted any male whose father or grandfather could vote before January of 1867. (See 1898 Louisiana Constitution, Article 197, Section 5).

This proved effective. In January of 1897 there were 130,344 black citizens registered to vote. After the new constitution went into effect, all but 5,320 black registered voters had been eliminated - a net loss of 125,024 voters![2]

With the 1921 Constitution, Louisiana again moved aggressively to prohibit black citizens from fully participating in the electoral process. Article 8, Section 1(c) instituted a "good character" clause and an "understanding" clause to block registration by black citizens. Anyone in a common law marriage or who had an illegitimate child, or any other character "problem" apparent to the registrar of voters could be denied registration. The "understanding" clause demanded that upon request of the local registrar, a person could be denied the right to register if they could not give a reasonable interpretation of any section of the Louisiana or U.S. Constitution.

These obstacles to voter registration were operative until 1963 when a three-judge court struck them down. U. S. v. Louisiana, 225 F.Supp. 353 (E.D. La. 1963) affirmed 380 U.S. 145 (1965).

D. THE HISTORY OF FEDERAL AND JUDICIAL INTERVENTION

Louisiana has actively fought every advance made by black citizens since 1812. When an opportunity presented itself for progress, Louisiana fashioned a new barrier. Only by active use of the judicial system has any progress been possible in the area of voting rights and reapportionment.

In "Voting Rights: A Case Study of Madison Parish Louisiana" 38 University of Chicago Law Review 726, a research project of the American Bar Association shows clearly and in great detail the necessity of federal intervention by the Justice Department and the federal courts in securing and protecting the right to vote in Louisiana.

Every advancement towards equal justice has come about only after a substantial battle. Louisiana voting rights cases and other actions to end discrimination are legion. A few that illustrate:

Byrd v. Brice, 104 F.Supp. 442 (W.D. La. 1952) - stopping use of voucher system to prevent registration in Bossier Parish;

Wyche v. Ward, #4628, (W.D. La. 1954) - barriers to voter registration in Madison Parish;

Davis v. N. O. Public Service, (E.D. La. 1957) - desegregation of N. O. streetcars;

U.S. v. Manning, 205 F.Supp. 172 (W.D. La. 1962) - voting discrimination in East Carroll Parish;

U.S. v. Ward, 222 F.Supp. 617 (W.D. La. 1963) - voucher system in Madison Parish;

Brown v. Post, 297 F.Supp. 60 (W.D. La. 1968) - discrimination in absentee ballots;

U.S. v. Post, 297 F.Supp. 46 (W.D. La. 1969) - discriminatory manipulation of voting machines;

Toney v. White, #15,641 (W.D. La. 1970) - purge of black voters.

In voting rights cases the Justice Department and the federal courts have been involved in nearly every reapportionment of a Louisiana political subdivision: East Carroll Parish[3], Baton Rouge[4], New Orleans[5], Iberville Parish[6], Rapides Parish[7] and many, many others.

The last statewide reapportionment by the Louisiana legislature was also challenged by black citizens. It was thrown out and the lines re-drawn by a special master[8], just as this one should be.

E. CONCLUSION

There are many in-depth reviews of the attempts by Louisiana to stop black citizens from fully participating in the electoral process.[9]

It is clear that this has been going on since 1812, and it is unfortunately still going on.

Louisiana politicians do not respect the constitutional rights and the voting rights of its black citizens. Even the human rights of its citizens are routinely denied. In Ironton, Louisiana, an all-black town had to wait until two years ago for running water. Until 1978 their water was brought in by truck! Only after civil rights remedies were pursued and the "60 Minutes" television show became involved did the town's residents receive what every other white town in Louisiana has for decades - water. If human rights can be so blithely denied, is it any wonder that the right to vote is denied?

The plan for reapportioning the U.S. Congressional Districts is a continuation of the long history of voting rights abuses in Louisiana. In its historical context, it appears almost as if it should have been anticipated. Like the other instances of voting rights abuse, it must be cured by prompt action on the part of the Justice Department and the federal courts.

F. HISTORY FOOTNOTES

1. Dufour, P., Ten Flags in the Wind, p.239.

2. See: U.S. v. Louisiana, 225 F.Supp. 353 at page 374.

3. 96 S.Ct. 1083

4. 594 F.2d 56

5. 96 S.Ct. 1357

6. 536 F.2d 101

7. 315 F.Supp. 783

8. 333 F.Supp. 452 (M.D. La. 1971) Bussie v. McKeithen.

9. Four excellent historical reviews of Louisiana's refusal to allow black citizens full parity in its social, economic, legal and political systems are the following: "Modifications in Louisiana Negro Legal Status Under Louisiana Constitution, 1812-1957" by Paul A. Kunkel in volume XLIV of The Journal of Negro History, pages 1-25, January 1959; " 'Voting Rights' A Case Study of Madison Parish Louisiana," 38 U. Chicago Law Review, pages 726 - 787; "Negro Voting Rights" 51 Virginia Law Review 1053 (Louisiana emphasis, pages 1965 - 1979) 1965; and in the reported decision of U.S. v. Louisiana, 225 F.Supp. 353 (E.D. La. 1963), affirmed 380 U.S. 145 (1965) wherein Judge Wisdom gives a detailed lesson in Louisiana's history of denial of justice to its black citizens.

IV. CHANGES IN LOUISIANA POPULATION 1970-1980

In 1970, Louisiana had 3,644,637 citizens. 2,541,498 were white (or 69.8%) and 1,086,832 were black (or 29.8%).

In 1980, Louisiana had 4,203,972 citizens, a 15.3% increase. Of this number 2, 911,243 are white (or 69.2%) and 1,237,263 are black (or 29.4%).

CHART 1 - LOUISIANA-

Year	Total Population	White	Black	% White	% Black
1970	3,644,637	2,541,498	86,832	69.8	29.8
1980	4,203,972	2,911,243	1,237,263	69.2	29.4
Change:	+559,335	+369,745	+150,431	-.6	-.4

Around the state, the City of New Orleans lost population in the white community while the black population grew:

CHART 2 - NEW ORLEANS -

Year	Total Population	White	Black	% White	% Black
1970	593,471	323,420	267,308	54.4	45.0
1980	557,482	236,967	308,136	42.5	55.2
Change:	-35,989	-86,453	+40,628	-11.9	+10.2

V. LOUISIANA'S SUBMITTED PLAN

The plan submitted by the state reduces the number of black population majority districts in Louisiana from 17 to 14. They admit this in their "statement of anticipated effect of change on members or racial minority groups."

The plan submitted by the state reduces the number of black majority districts in New Orleans from 11 districts to 7. The state admits this in one part of their plan (page 23 of "Reasons for Reapportionment Change") but denies it in another part (see "Statement of Anticipated Effect").

The state black population remained stable from 1970 to 1980 - at 29%. During the decade, the population trends had more black citizens coming to the cities. New Orleans, for example, went from 45% to 55% black in the 1970's.

The state glosses over these losses of black majority districts by trying to confuse the issue by:

Comparing legislators with legislative districts;

Witholding information about population changes; and

By applying standards to exclude black majority districts while violating those same standards in creating white majority districts.

It does not work.

No amount of false comparison and fancy footwork can obscure the facts of real losses in black districts.

In 1970 districts, with 1980 census data, there were 17 black majority districts around the state. Under the new plan, there are 14.

In 1970 districts, with 1980 census data, there were 11 black districts in New Orleans. Under the new plan, there are 7.

These are real losses. The state does not come close to carrying their burden of proving these losses do not dilute minority voting strength. That is the effect. We submit that is the intention of the state's plan.

VI. OBJECTIONS

A. OVERALL DILUTION OF BLACK VOTING STRENGTH

Prior to the reapportionment of Louisiana's House of Representatives there were 17 black majority districts: Districts 2, 4, 17, 63, 67, 68, 87, 88, 90, 91, 92, 93, 95, 96, 97, 101 and 102 were black population majorities with 1980 census data.

After reapportionment, there were 14 black majority districts - a loss of 3 black majority districts despite the fact that the percentage of black citizens in Louisiana remained stable. The state does not dispute this loss.

The new black population majority districts are: Districts 2, 3, 17, 34, 58, 63, 67, 91, 93, 95, 96, 97, 101 and 102. (Chart 3, on the next page, shows what happened to the districts involved.)

Twelve districts had their black population percentage decline and eight districts increased their black population percentage.

Districts 2, 4, 67, 68, 87, 88, 90, 92, 93, 97, 101 and 102 lost a total of 260.9 percentage points of black population, while Districts 3, 17, 34, 58, 63, 91, 95 and 96 gained a total of 99.2 percentage points of black population, for a net loss of 161.7 points!

B. DILUTION OF BLACK VOTING STRENGTH IN NEW ORELANS

In the City of New Orleans the effect of the

CHART 3 - BLACK POPULTION DISTRICTS (BEFORE AND AFTER REAPPORTIONMENT)

DISTRICT	BEFORE	%WHITE	%BLACK	AFTER	%WHITE	%BLACK
2		8.7	91.0		9.7	90.0
3		54.9	44.2		28.8	70.5
4		46.4	53.0		79.6	19.4
17		36.0	63.5		31.0	68.5
34		61.0	38.5		32.5	67.0
58		58.4	41.4		49.6	50.3
63		26.0	73.6		18.6	80.8
67		15.8	82.7		31.9	64.6
68		46.2	53.2		52.2	46.8
87		40.8	57.8		56.3	39.6
88		32.0	67.1		96.3	1.4
90		42.8	56.4		50.5	48.4
91		26.5	72.7		17.3	81.9
92		32.7	66.2		77.1	20.4
93		15.6	83.6		27.5	71.4
95		44.5	52.2		35.2	62.6
96		33.8	64.6		20.0	79.0
97		16.8	82.2		19.7	78.7
101		9.8	89.4		14.4	84.8
102		3.9	95.8		46.4	52.0

Legislature's dilution of black voting strength is most clearly demonstrated.

New Orleans has the largest population of black citizens in the entire state, In the decade from 1970 to 1980, the City lost 35,989 in population while the rest of the state grew. New Orleans had therefore to give up 3 of its 18 seats in the House of Representatives in the reapportionment process.

Despite the fact that New Orleans' black population actually increased both in real numbers and in a percentage of the population from 45% in 1970 to 55% in 1980 (see Chart 2, page 10), the legislature severely cut back on the number of black majority districts.

Prior to the reapportionment in 1981, 11 of the 18 house districts in New Orleans had over 50% black majority population. Seven districts were majority white. After reapportionment, the number of black majority districts fell from 11 to 7 and the number of white majority districts increased from 7 to 8! An exact reversal of what happened to the City's population!

Chart 4 shows that prior to reapportionment, Districts 87, 88, 90, 91, 92, 93, 95, 96, 97, 101 and 102 were majority black districts. Districts 86, 89, 94, 98, 99, 100 and 103 were majority white. After reapportionment, Districts 91, 93, 95, 96, 97, 101, and 102 were black majority districts while Districts 86, 89, 90, 94, 98, 99, 100 and 103 were white majority. Three other districts were renumbered in a different part of the state.

CHART 4 - NEW ORLEANS DISTRICTS BEFORE AND AFTER REAPPORTIONMENT

DISTRICT	BEFORE	%BLACK	%WHITE	AFTER	%BLACK	%WHITE
	86	12.8	82.7	86	15.2	79.7
	87	57.8	40.8	87	went to Jeff. Par.	
	88	67.1	32.0	88	went to Jeff. Par.	
	89	15.0	82.9	89	21.4	76.8
	90	56.4	42.8	90	48.4	50.5
	91	72.7	26.5	91	81.9	17.3
	92	66.2	32.7	92	went to Jeff. Par.	
	93	83.6	15.6	93	71.4	27.5
	94	3.5	95.4	94	13.7	84.9
	95	52.2	44.6	95	6.26	35.2
	96	64.6	33.8	96	79.0	20.0
	97	82.2	16.8	97	78.7	19.7
	98	39.8	58.0	98	35.9	62.4
	99	39.4	59.3	99	42.4	56.1
	100	42.2	51.0	100	36.7	52.5
	101	89.4	9.8	101	84.8	14.4
	102	95.8	3.9	102**	52.0	46.4
	103	34.5	63.9	103	47.8	51.3

The effect of this is spelled out in the following: Prior to reapportionment, black majority districts comprised

61% of the New Orleans house seats. After reapportionment, black majority seats fell from 61% of the New Orleans share to 46% of the share, white majority districts increased from 39% to 54%, while the population of New Orleans shifted from 45% black to 55% black! The white dominated legislature made the black commuity absorb all of the loss in seats that came about primarily because over 80,000 white left the City in the 1970's. In addition, the legislature has made the white seats increase a seat despite the fact that the white population fell 10% in the City.

This is clearly retrogression and also evidences the legislature's intent to rob black citizens of a fair proportion of the house seats.

Clearly, New Orleans suffered a serious setback in black voting strength by reducing its share of black population majorty House seats from 11 to 7.

Clearly, the white surge ahead in population majority seats from 7 to 8, while at the same time losing 10% of the population, shows that unjustifiable white advancements were made at the expense of black citizens.

As the New York and North Carolina objections noted, the governing body must demonstrate that the plan "fairly reflects the strength of (minority) voting power as it exists today, "quoting Mississippi v. U. S., 490 F.Supp. 569, 581 (D.D.C. 1979). It is also the duty of the Justice Department to compare "the projected impact of the proposed plan with the expected election results" under the present plan. (See New York Letter).

Additionally, several plans that were before the legislature were significant improvements over the plan adopted. These plans are analyzed in depth in Section VII ot this comment. The plan proposed by Representatives Jackson and Johnson could have more fairly dealt with the eastern part of New Orleans. Other plans of the League of Women Voters, the Survival Coalition and the Legislative Black Caucus, were also offered. These plans all show how possible it was to deal with New Orleans fairly and in a nondiscriminatory fashion. The Henderson plan, attached to this comment as Appendix 3, affords yet another opportunity to reapportion in a fair manner.

The loss of black majority districts, the increase of white majority districts despite substantial loss of white population, and the number of alternative reapportionment plans that do not dilute black voting strength, indicate that the legislature's actions had the effect of diluting black voting strength and effecting a "retrogression" in minority participation in the political process.

There are several indications that the Louisiana legislature was fully aware of what it was doing and in fact, intended to discriminate against black participants in the reapportionment of New Orleans.

The history of Louisiana politics and the repeated attempts to frustrate gains by black citizens has been set out at Section III, prior to this. These past blatantly discriminatory actions of the Legislature must be used as a context in which to evaluate the present discriminatory actions. Is this present discrimination an accident? Historical analysis suggests not.

In Appendix 2 there are clippings of news accounts surrounding the Louisiana reapportionment. A cursory examination of these clippings demonstrates that the cries of protest from black legislators were raised again and again to point out the injustices complained of here. Despite these warnings, the legislature plowed ahead trampling the obvious criticisms. The total lack of response to calls for nondiscriminatory plans again suggests a purposeful discrimination.

The maps of the districts in Appendix 1 also show that zigs and zags were made to include and exclude on the basis of race. Gerrymandered districts are now the rule and not the exception. Natural boundaries are ignored so that racial boundaries can be manipulated.

Finally, there appears no nonracial justification for such actions. The Louisiana plan and its supporting materials make a token effort to justify their activities on the basis of staying within court-ordered boundaries but a glance at the contorted districts that result show this is only an argument of convenience. The Henderson plan, attached at Appendix 3, shows how much cleaner these districts look, have a lower deviation, and still not dilute minority participation.

No, if one looks at Louisiana's history, the news accounts of the process, the districts themselves, and the exclusion of all reasonable alternatives, it becomes clear that the Louisiana legislature's reapportionment plan had not only the effect but also the purpose of discriminating against black citizens.

C. DILUTION OF BLACK VOTING STRENGTH IN LAFAYETTE

The City of Lafayette has a total population of 81,961 according to the latest Census data. There are 57,776 whites and 22,832 blacks with the City's population being 28.4% black.

The black community in Lafayette is clearly defined and bounded by significant geographical and natural boundaries.

This area, called Lafayettes Central City, has a growing black population. The core of this is precincts: 1B4; 1C1; 1C2; 1C3; 2D3; 2E1; 2F1; 2F2; 2F3; 3G1; 3H2; 3H3; 3I1; 3I2; 3I3; 3I4; 3I5; 4L3; and 4L4. If placed all together these would constitute a black majority district of about 56%.

The legislative plan divides this black population center between districts 42 and 44.

All of the other plans submitted to the legislature on a state level (the plans of the Survival Coalition, League of Women Voters and the Legislative Black Caucus) did not divide the black community nearly as much. (See Appendix 6 for alternative plans.)

Other plans submitted at the regional hearing on reapportionment in Lafayette also did not divide the community. These plans include plans submitted by Charles Johnson, a prominent Republican, as well as similar plans submitted by the Louisiana Black Assembly ("the Darnel Plan") and others. (See Appendix 6 for these plans.)

The Henderson plan, submitted with this comment, also shows the ease of implementing a nondiscriminatory plan.

Considering the overwhelming number of alternatives which do not divide the black community, the geographical compactness of the district, and the fact that the black community is growing - the legislative plan is a retrogression and should be voided. In the same sense as the City of New York could not justify their reapportionment on an argument of maintaining the status quo, so must the legislature's claim of maintaining the 1973 boundaries fall.

Attached to this comment, in Appendix 6, are copies of news clippings outlining the discussion going on during the hearings and decisions on reapportionment. These demonstrate a willingness to override the legitimate concerns of non-dilution.

The Justice Department has had to object to at least three other Lafayette redistricting plans (two police jury, one school board).

These indicators, plus the absence of any viable justification for the legislatively adopted plan, demonstrate clear intent of the legislature to purposefully deny access of the minority community to the political process.

VII. ALTERNATIVE PLANS

General alternative plans were submitted to the legislature for their review. All of the plans had more black majority districts than the adopted plan.

The Survival Coalition submitted a statewide plan that had 20 black majority districts. This plan, which is attached as Appendix 5, complemented the House Committe plan and added 7 black districts. This plan was rejected by the state.

The Black Caucus submitted a plan which created 17 black majority districts. This too was rejected even though it really only maintained the *status quo*.

Attached as Appendix 3 is a plan drawn up by Gordon Henderson, an expert in reapportionment, who developed this plan *using the criteria set out by the state* in its submission.

The Henderson plan demonstrates what could be done if the legislature truly followed its own criteria. His districts have much lower population variances, % total versus over 9% by the state! His districts are also consistently more compact and cross fewer ward and parish lines. Additionally, the Henderson plan creates black population majority districts.

VIII. CONCLUSION

Louisiana's redistricting plan for its House of Representatives is defective because it clearly has the effect and the purpose of turning back the clock and again diluting the voting rights of black citizens of the State.

The plan is objectionable and the Justice Department should act accordingly.

Voting Rights in the South—Ten Years of Litigation Challenging Continuing Discrimination Against Minorities

(By Laughlin McDonald, Director, ACLU Southern Regional Office)

Introduction

This report discusses the litigation and administrative proceedings brought by the Southern Regional Office of the American Civil Liberties Union over the past ten years to combat racial discrimination in voting in the South. It assesses the impact of the Voting Rights Act of 1965, and the need for extending its special provisions beyond their effective expiration date in August 1982.

The report is divided into five sections. The *History of Disfranchisement* details the lengths to which post-Reconstruction governments in the South went to make sure that minorities would never be able to exercise the power of the vote. It is a sorry record which cannot be dismissed simply as "past history," because its legacy of voting discrimination remains powerful to this day.

Modern Enfranchisement describes the slow steps, recently taken, toward securing equal voting rights for minorities, steps which culminated in the Voting Rights Act of 1965.

Progress Under the Voting Rights Act shows how the act has increased black voter registration and the number of minorities elected to office.

Continuing Barriers to Equal Political Participation, the heart of the report, proves through the accumulated evidence of ACLU lawsuits that voting discrimination has not disappeared. The problem remains widespread and persistent. The part on *Section 5 Noncompliance* shows how many local governments have blatantly and repeatedly ignored the requirements of the Voting Rights Act and instituted new voting procedures that are discriminatory and illegal. The *Use of Discriminatory Voting Practices Adopted Prior to the Voting Rights Act* presents the even more difficult problem of existing voting practices that are clearly discriminatory but that cannot be reached effectively by the Voting Rights Act as currently interpreted.

Conclusions and Recommendations states the inescapable: the Voting Rights Act must be extended and its provisions strengthened. To improve enforcement of the Act, the U.S. Attorney General should actively monitor changes in voting procedures, and victims of voting discrimination should be able to collect damages from local officials. To help successfully challenge discriminatory voting procedures instituted before passage of the Act, Section 2 should be amended to restore the original intent of Congress, namely that election procedures are unlawful if they have a discriminatory purpose or *effect*.

The ACLU's Southern Regional Office opened in 1965 to assist in the struggle for equal rights in the South. Our program, then and now, consists primarily of litigation. In the beginning, the Southern office concentrated on jury and prison desegregation, and handled such cases as *Whitus* v. *Georgia* (1967),[1] invalidating discriminatory jury selection procedures in Georgia, and *Lee* v. *Washington* (1968), [2] declaring racial segregation unconstitutional in prisons and jails in Alabama. We did voting rights cases as well, including *Reynolds* v. *Sims* (1964), [3] which applied the one person-one vote principle to state legislative reapportionment.

Beginning in the early 1970's, however, our emphasis centered on voting rights. That was so, not because of any pre-conceived plan to concentrate on that kind of litigation, but for the reason that the predominant civil rights complaints we received from the black community were of continuing discrimination in the elective process. More often than not, the complaints were about the inability of blacks to elect candidates of their choice to office.

The complaints from local blacks acknowledged what has long been known, that equal voting rights are key to the provision of governmental services. When an official accountable to black voters sits on a city council and helps decide who will be the new city clerk or police dispatcher, the chances of a black applicant being considered and actually hired are improved than if the council is accountable only to whites. When blacks participate in the decision of where to pave streets, chances are sharply increased that the dirt road in the long-neglected black section of town will get a new surface.

But the complaints also acknowledged that equal voting rights involve more than paved streets and jobs, important as they are. There is an intrinsic value to effective political participation, including office holding, that transcends the provision of services. As Reconstruction and its aftermath of black disfranchisement demonstrate, equal voting rights are nothing less than an essential condition for racial equality itself.

Special acknowledgement is due the lawyers who helped prosecute the cases described in this report: Southern Regional Office staff Neil Bradley and Christopher Coates; past staff attorneys Reber Boult, Morris Brown, Emily Calhoun, and Norman Siegel; past director Charles Morgan, Jr.; cooperating attorneys James Blumstein, John Brittain. Herbert Buhl, Jeanne Chastain, Bob Cullen, Armand Derfner, Lois Goodman, John Harper, James Head, I. S. Leevy Johnson, Peggy Mastroianni, Ray McClain, Frank Parker, Julian Pierce, Henry Sanders, Edward Still, and David Walbert.

Several cases were cosponsored by the ALCU with other organizations: Georgia Indigent Legal Services; National League of Women Voters; and Lumbee River Legal Services. The *Index* to the report lists all ALCU cases by name and jurisdiction. and identifies those which are cosponsored as well as those in which the ALCU participated as *ancus curae.*

This report could not have been completed without the able secretarial assistance of Donna Matern and Marilyn Bright, nor the editing of Ari Korpivaara and Laura Murphy.

Finally, I wish to thank Ira Glasser, executive director of the ACLU, and his predecessor, Aryeh Neier, for their constant support and encouragement of the work of the Southern Regional Office.

L[illegible]LIN McDONALD,
Director, Southern Regional Office,
ACLU Foundation, Inc.,
Atlanta, Georgia, January 1982.

NOTES

1. 385 U.S. 545 (1967).
2. 390 U.S. 333 (1968).
3. 377 U.S. 533 (1964).

HISTORY OF DISFRANCHISEMENT

Prior to the Civil War, voting was typically limited throughout the country to white male property owners over 21 years of age. In only six northeastern states did blacks have any access at all to the franchise.[1] After the war, the confederate states were compelled by the First Reconstruction Act of 1867 to adopt new constitutions guaranteeing male suffrage without regard to race as a condition for re-entering the Union.[2] Subsequently, the Fifteenth Amendment was adopted in 1870, guaranteeing nationwide—at least in theory—the equal right to vote irrespective of "race, color, or previous condition of servitude."

The Thirteenth Amendment, abolishing slavery in 1865, has also been held to prohibit discriminatory election procedures,[3] while the Fourteenth Amendment, with its general prohibition of discrimination, has been widely used in more recent times to protect the equal right to vote.[4]

Congress promptly implemented the Fifteenth Amendment by enacting a variety of election laws.[5] The right to vote in all national and state elections was guaranteed. Election officials were required to give all citizens the equal chance to cast ballots and various discriminatory acts were made federal crimes, including the violation of state law in a federal election by any state or federal official. A system was also established of federal supervision of elections and voter registration.

During the early years of Reconstruction, Congress enforced the Fifteenth Amendment and its enabling legislation through criminal prosecutions, the election supervision program and by dispatching federal troops to protect black voters from public and private fraud and intimidation.[6] Blacks registered and voted in substantial numbers and many were elected to local, state and national offices. Some states were nominally under black/Republican control, while 20 blacks served in the House of Representatives and two in the United States Senate during Reconstruction.[7]

Southern whites, however, never acquiesced to black enfranchisement. Edgefield County, South Carolina, home of the notorious B. R. "Pitchfork Ben" Tillman, was typical of the time and place.[8] After the grant of general suffrage in 1867, local Democratic and agricultural societies were formed in the county whose purposes, among others, were to use social and economic coercion to deter blacks and white Republicans from voting. The Democrats failed in these early attempts to regain dominance, and as a consequence turned to fraud and violence as a means of restoring political control. Rifle and sabre clubs were formed in virtually every township, and operated as a terrorist wing of the Democratic Party.

Tillman was a charter member of one such club, the Sweetwater Sabre Club, organized in 1873. He became captain three years later, and was in command when two of his men executed Simon Coker, a black state senator from nearby Barnwell.[9]

Violence reached its zenith in Edgefield in July, 1876, at the infamous massacre in the town of Hamburg. Tillman, one of the participants, conceded that it "had been the settled purpose of the leading white men of Edgefield to provoke a riot and teach the Negroes a lesson and if one did not offer, we were to make one."[10] Rampaging whites attacked the town and killed a number of blacks. When none were tried or convicted for the murders, it was taken as a sign that Republican control had been broken, and that Reconstruction was coming to an end.

The results of the next county election in 1876 were determined by the "Edgefield Plan" for redemption, authored by George Tillman and General Martin Witherspoon Gary, the fierce unreconstructed "Bald Eagle of the Confederacy." The watchword adopted for the campaign was "Fight the Devil with Fire."

Every Democrat, the standing rules provided, "must feel honor-bound to control the vote of at least one Negro, by intimidation, purchase, keeping him away or as each individual may determine. how he may best accomplish it." [11] As for violence, never merely threaten a man: "If he deserves to be threatened, the necessities of the times require that he should die." [12] Tillman wrote later that "Gary and George Tillman had to my personal knowledge agreed on the policy of terrorizing the Negroes at the first opportunity." [13]

On election day, Gary and several hundred armed men seized the two polling places in Edgefield—the Masonic Hall and the courthouse—and refused to allow blacks in to vote. Open race warfare, together with Gary's doctrine of voting "early and often," was enough to ensure a Democratic majority.

The following year, the Edgefield Plan was essentially condoned by the Compromise of 1877, ending Reconstruction and withdrawing federal troops from the South. [14] Control of Edgefield and the region as a whole was left to men like Tillman, who had vowed never again to see whites subjected to the humiliation of black enfranchisement.

The Democratic redeemers, such as Tillman, had been substantially aided in their recapture of political power by the courts and Congress which systematically dismantled many of the Reconstruction civil rights laws. On March 27, 1876, the Supreme Court, in a pair of decisions, declared unconstitutional, or narrowly construed, major provisions of the Enforcement Act of 1870, the effect of which was to undermine Congress' attempts to protect black voters from official and private intimidation. [15] The Court continued its assault upon the civil rights laws in a series of later opinions essentially nullifying the Reconstruction acts designed to guarantee equal rights to blacks. [16]

Not all decisions construing the Reconstruction Acts were hostile to the rights of blacks. *Ex Parte Siebold* [17] and *Ex Parte Yarbrough* [18] acknowledged the guarantee of equal protection in voting in congressional elections. [19] Since most states utilized the same registration and election procedures for state as well as federal officials, the effect of these decisions was to allow the courts in later, more receptive years to regulate voter fraud and abolish the discriminatory all-white primary. [20] But as far as the post-Reconstruction years were concerned, these cases were the exceptions, and were never effectively enforced.

The effects of the Compromise of 1877 and the process of federal disengagement from state politics were predictable. The Southern redeemers, led by men such as Ben Tillman, were set increasingly free to institutionalize white supremacy.

In South Carolina, the legislature passed in 1878 a law eliminating precincts in strong Republican areas and requiring voters to travel great distances to cast a ballot. Then in 1882, a complicated balloting procedure, amounting to a literacy test, was introduced; and another law required eligible voters to be registered by June, 1882. Those who failed to register were barred from registration thereafter, and the only additional registration was for those who became eligible after June, 1882.

Local officials had full discretion in implementing the registration requirements, and aggrieved persons had to appeal within five days and institute suit within 15 days. The laws were an invitation to fraud, and were used for the sole purpose of disfranchising blacks. [21] Similar methods of "regulating" the black vote were adopted in other Southern states. [22]

Even though politics had been successfully redeemed in the South within a few years of the end of Reconstruction, ruling whites still felt the need for more systematic means to take the actual ballot out of the hands of blacks, and to replace their despised Reconstruction constitutions, often known derisively as Radical Rags. Moreover, the fraud and corruption which it had been necessary to practice to restore white supremacy had distorted the political process nearly beyond recognition or use. Some kind of reform, some permanent, technically legal way of taking away the vote from blacks, was clearly needed.

Judge J. J. Chrisman of Mississippi, a state which was to lead the movement for permanent disfranchisement, commented upon the condition of things in his state in 1890: "[I]t is no secret that there has not been a full vote and a fair count in Missisipp[i] since 1875—that we have preserved the ascendancy of the white people by revolutionary methods. In plain words, we have been stuffing ballot boxes, committing perjury, and here and there in the State carrying elections by fraud and violence until the whole machinery for election was about to rot down. No one would deliberately choose to perpetuate such methods . . . who was not a moral idiot."[23]

To accomplish "legal" disfranchisement of blacks, Mississippi called a constitutional convention in 1890. There was nothing covert about the motives of the conventioneers, nor the purpose of the convention itself. The intent, quite simply, was to disfranchise as many blacks as possible within the limitations of the Fourteenth and Fifteenth Amendments. As one delegate declared: "That is what we are here for today to secure the supremacy of the white race."[24] Another remarked more poetically, but equally to the point: "We are embarked in the same ship of white supremacy, and it is freighted with all our hopes."[25]

The convention favored repeal of the Fifteenth Amendment and adopted such a position in the Resolution of its Preamble Committee. Repeal, however, was out of the question as a matter of political reality. The delegates would have to content themselves with lesser measures. None doubted that they would be found. As one delegate declared: "The remedy is in our hands. We can if we will afford a safe certain and permanent white supremacy in our State." [26]

A new constitution was adopted on November 1, 1890. While the Constitution of 1869 had granted the right to vote to any male over the age of 21 resident in the state for six months and not disqualified by reason of insanity, idiocy, or conviction of certain crimes, the new constitution imposed a residency requirement of two years, payment of an annual poll tax, and passage of a literacy test as conditions for voting.

The literacy test stood to have a devastating impact upon blacks. At the time of its adoption, 76% of blacks in Mississippi were illiterate. Still, 11% of whites were also illiterate. To make certain that the test did not accidently disfranchise some whites, for that was never its purpose, an exemption from literacy was created in favor of those who could understand any section of the state constitution read to them by the registrar. The exemption, administered as it was by whites, was nothing more than another device for disfranchising blacks without at the same time depriving any illiterate whites of the ballot.

The disfranchisement measures adopted by the 1890 convention were effective beyond belief. In 1867, 70% of the black voting age population in Mississippi was registered to vote. By 1889, the figure had plummeted to 9%.

Years later, at a reunion of delegates of the Convention of 1890, the Chairman conceded that: "It was no easy task for the convention . . . to enact a State constitution practically eliminating from the electors of the State at least eight-tenths of its colored people, citizens of the United States, in the face of the Fifteenth Amendment."[27] Judge R. H. Thompson, another reunion delegate, was still in awe of the convention's accomplishments. There was "scarcely a conceivable scheme having the least tendency to eliminate the Negro vote that was not duly considered by the convention," he said. "It is regrettable that all the suggestions . . . were not recorded; had they been preserved, the record would be a monument to the resourcefulness of the human mind."[28]

The delegates of the Convention of 1890 were mindful of the Fifteenth Amendment and were careful to cast the provisions of the new constitution in racially neutral terms. But they need not have been, for in 1894 all but seven of the forty-nine sections of the Enforcement Acts were repealed by Congress at a single stroke.[29] Suffrage laws were reduced even more when the Criminal Code was adopted in 1909.[30]

Other Southern states followed Mississippi's lead, and with the exceptions of Texas and Florida, adopted literacy tests for voting as the heart of their disfranchising schemes. The ranks of black registered voters were devastated by these states strategems.[31]

Still, no device was to be overlooked in safeguarding the electorate. Eleven States in the South eventually adopted all-white primary elections, from which even those few blacks who were registered were excluded from voting. Since nomination in the primary was tantamount to election to office in these states, blacks were totally shut out from the political process.

Challenges were made to the disfranchising schemes of South Carolina,[32] Alabama,[33] Virginia, [34] and Mississippi,[35] but the Supreme Court dismissed them on technical or procedural grounds, glossing over the racial discrimination patent in the records before it. The Supreme Court continued to uphold the various devices for disfranchisement over the fifty years. In 1937, it found the poll tax constitutional as an "appropriate" condition for suffrage within the power of the states to impose.[36] All-white primaries were approved of in 1935, provided they were not required by state law.[37] Literacy tests were held constitutional as late as 1959, because they had "some relation to standards designed to promote intelligent use of the ballot."[38]

Nearly 90 years after its adoption, the Fifteenth Amendment's promise of equal voting lay broken at the hands of Congress, the courts, and the individual states of the Union.

NOTES

1. *Oregon* v. *Mitchell*, 400 U.S. 122, 156 (1970).

2. Act of March 2, 1867, ch. 153, 14 Stat. 428.

3. *Sullivan* v. *DeLoach*, Civ. No. 76–238 (S.D.Ga., Sept. 11, 1977).

4. *E.g.*, *White* v. *Regester*, 412 U.S. 755 (1973).

5. Enforcement Act of May 31, 1870, ch. 64, 16 Stat. 140; Enforcement Act of Feb. 28, 1871, ch. 49, 16 Stat. 433.

6. A. Derfner, "Racial Discrimination and the Right to Vote," 26 Vand. L. Rev. 523, 530 (1973).

7. J. Franklin, *From Slavery to Freedom*, 317–23 (3d ed. 1967).

8. For a fascinating account of Reconstruction in Edgefield see O. V. Burton, "Ungrateful Servants? Edgefield's Black Reconstruction: Part I of the Total History of Edgefield County," South Carolina. Princeton University, Ph.D., 1976.

9. For a good discussion of Tillman's life, see F. B. Simkins, *Pitchfork Ben Tillman, South Carolinian* (L.S.U. Press, 1944).

10. L. McDonald, "Voting Rights on the Chopping Block," *Southern Exposure*, May, 1981, 89.

11. Burton, *supra*, 111.

12. *Ibid.*

13. *Ibid.*, 112.

14. Southern Democrats agreed to support Republican Rurtherford B. Hayes in the contested presidential election of that year, awarding him the disputed votes of three unredeemed states, with the understanding that thereafter the South would be allowed to solve its race problem in its own way. *See* C. Vann Woodward, *Reunion and Reaction: The Compromise of 8177 and the End of Reconstruction* (1951).

15. *United States* v. *Cruikshank*, 92 U.S. 542 (1876) restricted the offenses cognizable under the conspiracy provisions of the Act, while *United States* v. *Reese*, 92 U.S. 214 (1876) held unconstitutional Sections 3 and 4 of the Act because they did not prohibit state interference with voting rights solely on the basis of race.

16. *United States* v. *Harris*, 106 U.S. 629 (1883) (struck down Section 2 of the Act of 1871 prohibiting conspiracies to deprive citizens of equal protection of the law); *Civil Rights Cases*, 109 U.S. 3 (1883) (declared unconstitutional provisions of the Civil Rights Act of 1875 guaranteeing equal access to public accommodations); *Baldwin* v. *Franks*, 120 U.S. 678 (1887) (conspiracy statutes could not be construed to reach private misconduct unaided by official action); *James* v. *Bowman*, 190 U.S. 127 (1903) (declared unconstitutional Section 5 of the Act of 1870 prohibiting bribery to prevent persons from voting); *Hodges* v. *United States*, 203 U.S. 1 (1906) (Section 16 of the Act of 1870 protecting the rights of blacks to contract for employment ruled invalid). *Also see Slaughterhouse Cases*, 83 U.S. 36 (1873), and *Minor* v. *Happersett*, 88 U.S. 162 (1875), giving a narrowing construction to the broad language of the Fourteenth Amendment.

17. 100 U.S. 371 (1880).
18. 110 U.S. 651 (1884).
19. Other decisions protected the right to equal treatment in jury selection, *i.e.*, *ExParte Virginia*, 100 U.S. 339 (1880), and *Strauder* v. *West Virginia*, 100 U.S. 303 (1880).
20. *United States* v. *Classic*, 313 U.S. 299 (1941); *Smith* v. *Allwright*, 321 U.S. 649 (1944).
21. McDonald, *supra*, 90.
22. *See* A. Derfner, *supra*, 534 n.38 and sources cited therein.
23. Quoted in C. Van Woodward, *Origins of the New South, 1877–1913*, 57–8 (1951).
24. *United States* v. *State of Mississippi*, 229 F.Supp. 925, 986 (S.D. Miss. 1964).
25. *Ibid.*
26. *Ibid.*
27. *Ibid.*, 986–87.
28. *Ibid.*
29. Act of February 8, 1894, ch. 25 28 Stat. 36.
30. Act of March 4, 1909, ch. 321, 35 Stat. 1088.
31. In Louisiana, for example, in 1896, there were 130,334 blacks registered to vote By 1900, there were only 5,320. "Political Participation, A Report of the United States Commission on Civil Rights," Washington, D.C., May 8, 1968.
32. *Mills* v. *Green*, 159 U.S. 651 (1895).
33. *Giles* v. *Harris*, 189 U.S. 475 (1903); *Giles* v. *Teasley*, 193 U.S. 146 (1904).
34. *Jones* v. *Montague*, 194 U.S. 147 (1904); *Selden* v. *Montague*, 194 U.S. 153 (1904).
35. *Williams* v. *Mississippi*, 170 U.S. 213 (1898).
36. *Breedlove* v. *Suttles*, 302 U.S. 277, 283, (1937), Numerous attempts were subsequently made to abolish the poll tax through federal legislation. It was not until 1964, however, with ratification of the Twenty-Fourth Amendment that the tax was banned in federal elections. Two years later in a case from Virginia, the Supreme Court, reversing its earlier decision, declared use of the poll tax in state elections to be unconstitutional because "the affluence of the voter or payment of any fee" was not a proper "electoral standard." *Harper* v. *Virginia State Board of Elections*, 383, U.S. 663, 666 (1966).
37. *Grovey* v. *Townsend*, 295 U.S. 45 (1935). Nine years later, however, the Court reconsidered the lawfulness of all white primaries and found them to be unconstitutional even where their racially exclusive policies had been adopted without aid or authorization of the legislation.. *Smith* v. *Allwright*, 321 U.S. 649, 664 (1944).
38. *Lassiter* v. *Northampton*, 360 U.S. 45, 51 (1959).

MODERN ENFRANCHISEMENT

The modern movement for enfranchisement began in the national legislature in 1957 when Congress passed the first Civil Rights Act since the Civil War.[1] The Act created the six member Commission on Civil Rights and gave it the duty of gathering information on discrimination in voting. Interference with voting in federal elections was prohibited, and the Attorney General was authorized to bring lawsuits to protect equal voting rights. Procedures were also provided for holding in criminal contempt those who disobeyed court orders prohibiting discrimination.

The Act was amended in 1960 to authorize federal referees to investigate voting discrimination and to register qualified voters.[2] Four years later, Congress passed the Civil Rights Act of 1964. It provided, among other things, that black registration be based upon the same voter qualifications which traditionally had been applied to whites; any literacy or other tests for voting be given entirely in writing; immaterial errors in answering test questions or fulfilling registration requirements not be made the basis for denying voter eligibility; and a sixth grade education was rebuttal evidence of literacy.[3]

The 1957, 1960 and 1964 acts, although they were often used effectively to deal with particular voting rights infringements,[4] did not result in the enfranchisement of any appreciable number of people. That was true primarily because the acts depended upon litigation for enforcement. Litigation, often involving countless appeals and retrials, to some extent merely played into the hands of recalcitrant officials and gave them further opportunity to evade their obligations under the law.

From 1957 to 1965, the Attorney General brought 71 suits under the three acts,[5] but voter registration in Mississippi increased from 4.4% in 1954 to only 6.4% in 1965. The increase in Alabama was from 14.2% in 1958 to 19.4% in 1964; in Louisiana, from 31.7% in 1956 to 31.8% in 1965.[6]

If any significant number of blacks were actually to be registered, clearing some approaches different from that contained in the civil rights acts of the 1950's and early 1960's would have to be developed.

In 1965, Congress adopted an entirely new plan for voter legislation. Instead of relying primarily on lawsuits as it had done in the past, Congress passed the Voting Rights Act of 1965,[7] which suspended the standards responsible for the exclusion of blacks from registration and placed supervision of new procedures in the hands of federal officials. The Act, amended in 1970 and 1975, when the protection was extended to language minorities.[8] contains both permanent and special provisions. The permanent provisions apply nationwide, while the special provisions apply only in jurisdictions that meet certain conditions specified in the Act.

The most important permanent provisions of the Act are: Section 2, which bans discrimination in voting based upon race, color or membership in a language minority; [9] and Sections 4 and 201 which abolished "tests or devices" for voting.[10] The term "test or device" includes literacy tests, educational requirements, good character tests, and exclusively English language registration procedures or elections conducted solely in English where a single linguistic minority comprises more than 5 percent of the voting age population of the jurisdiction.

Other permanent provisions: make it a crime to deprive or attempt to deprive anyone of rights protected by the Act; [11] and abolished durational residency requirements and established uniform standards for absentee voting in presidential elections.[12]

The most important temporary provision, often called the heart of the Voting Rights Act, is Section 5.[13] Section 5 applies only in those jurisdictions which used a literacy test or device for voting, and in which less than half of the voting age residents were registered or voted in either the 1964, 1968, or 1972 presidential elections.[14] Twenty-two states, or parts of states, are presently covered by Section 5—all of Alaska, Alabama, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia, and counties or towns in Connecticut, California, Colorado, Florida, Hawaii, Idaho, Massachusetts, Mchigan, New Hampshire, New York, North Carolina, South Dakota, and Wyoming.[15]

Jurisdictions covered by Section 5 may not implement any changes in voting unless they have first been pre-cleared. Pre-clearance may be obtained administratively by making a submission to the Attorney General, or judicially by filing a declaratory judgment action in the federal court of the District of Columbia. In either case, the jurisdiction seeking pre-clearance has the burden of showing that the change does not have the purpose or effect of denying or abridging the right to vote on account of race, color or membership in a language minority. If the jurisdiction cannot meet this burden, preclearance must be denied and the change cannot be implemented.

A jurisdiction may seek pre-clearance from either, or both, the Attorney General or the District of Columbia courts. There is no appeal from the decision of the Attorney General, but an appeal may be taken directly to the Supreme Court to review a decision of the District of Columbia courts.[16] Administrative submission to the Attorney General is a relatively simple and inexpensive process. No formal hearings or personal appearances are required, and a decision is guaranteed within 60 days (or 120 days if the department requests additional information). Not surprisingly, submission to the Attorney General has been the usual method of seeking pre-clearance.

Section 5 has been broadly construed to cover *all* proposed changes in election laws, including those which are seemingly minor, such as the relocation of a polling place.[17] According to the Department of Justice, approximately 35,000 changes in voting have been submitted for pre-clearance since 1965. See Table 1. Of these, 815 changes—over half since 1975—were found objectionable. Table 2. (Tables appear on pages 20–30.)

The changes most frequently submitted have been annexations, relocation of polling places, at-large elections, numbered posts, majority vote requirements, and reapportionment. Table 3. The greatest numbers of objections since 1975 have been to annexations, at-large elections, majority vote and numbered post provisions, and redistricting plans. Table 4. Georgia has received the most objections,

226. Louisiana is second with 136, and Texas, which only became covered in 1975, is third with 130.

Section 5 is enormously significant, for it prevents a jurisdiction from replacing old forms of discrimination with new ones. As the Supreme Court recently observed in an opinion affirming the constitutionality of Section 5: "Case-by-case adjudication proved too ponderous a method to remedy voting discrimination, when it had produced favorable results, affected jurisdictions often 'merely switched to discriminatory devices not covered by the federal decrees.' "[18] Section 5 was intended to block discrimination before it occurs, and place the burden of litigation or administrative proceedings and delay upon the perpetrators and not the victims of possibly objectionable practices.

Another special provision of the Voting Rights Act allows the Attorney General to send federal examiners and observers to covered jurisdictions from which twenty or more meritorious written complaints alleging voter discrimination have been received, or if the Attorney General determines that appointment is necessary to protect the equal right to vote.[19]

Examiners may register or list qualified voters. Those listed are issued registration certificates and may vote in all federal, state, and local elections. Federal observers act as poll watchers and determine whether all the eligible persons are allowed to vote and that ballots are properly counted. One hundred six counties since 1965 have been designated for federal examiners, and a total of 136,744 people listed by them as registered voters.[20] Table 5.

The use of examiners and observers is not as frequent today as during the early years of the Act's enforcement. Nonetheless, 733 observers were assigned by the Attorney General to 21 counties in the covered jurisdictions in 1980.[21] Table 6.

The special provisions of the Act allowing the appointment of observers and examiners, and requiring preclearance, can also be applied to non-covered jurisdictions through the so-called "pocket trigger" provisions of Section 3.[22] Section 3 was designed to reach pockets of discrimination in jurisdictions not otherwise covered by Section 5 and its provisions may be applied by any federal court which has found a violation of voting rights protected by the Fourteenth or Fifteenth Amendments. Federal examiners have been appointed in three jurisdictions under Section 3[23] and pre-clearance has been required in three others.[24]

The remaining special provision of the Act is Section 203 which requires covered jurisdictions in which a single language minority is more than 5 percent of eligible voters, as well as noncovered jurisdictions in which language minorities are more than 5 percent of eligible voters, and where the illiteracy rate within the language minority is higher than the national average, to conduct bilingual elections and registration campaigns.[25] More specifically, affected jurisdictions are required to provide registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, in the language of the applicable language minority group if such items and services are provided in English.

Jurisdictions required to provide bilingual election procedures include the entire states of Alaska, Arizona, and Texas and approximately 215 counties and townships, in California, Colorado, Connecticut, Florida, Hawaii, Idaho, Kansas, Louisiana, Maine, Michigan, Minnesota Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Virginia, Washington, Wisconsin, and Wyoming.[26]

Jurisdictions may exempt themselves from Section 5 coverage, or "bail out," by obtaining a declaratory judgment from the federal courts of the District of Columbia that for the preceding seventeen years (or fewer years if the jurisdiction became covered in 1970 or 1975) no test or device for voting was used with a discriminatory purpose or effect.[27] Because the Voting Rights Act banned tests or devices in many states in 1965 (the ban was not made nationwide until 1970), bail out will be virtually automatic for those states beginning on August 6, 1982.

Chief Justice Earl Warren quoting from the Fifteenth Amendment, summarized the meaning of the Voting Rights Act in an opinion he wrote for the Supreme Court in 1966 holding the Act to be constitutional:

> After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil. . . . Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live. We may finally look forward to the day when truly "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.[28]

TABLE 1.—NUMBER OF CHANGES SUBMITTED UNDER SEC. 5 AND REVIEWED BY THE DEPARTMENT OF JUSTICE, BY STATE AND YEAR, 1965 TO DEC. 31, 1980

State	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	Total
Alabama	1	0	0	0	13	2	86	111	60	58	299	349	153	146	142	295	1, 715
Alaska[1]	0	0	0	0		0	0	0			0	3	0	25	1	8	37
Arizona[2]	0	0	0	0	0	0	19	69	33	28	52	228	180	311	161	655	1, 738
California[3]						0	0	6	1	5	0	382	99	105	8	89	695
Colorado[3]											0	12	4	34	147	36	233
Connecticut[4]										0	0	0	0	0	0	0	0
Florida[3]											1	57	8	46	38	28	168
Georgia	0	1	0	62	35	60	138	226	114	173	284	252	242	444	371	689	3, 091
Hawaii[3]	0	0	0	0	0	0	0	0	0	0	0	6	0	0	0	3	9
Idaho	0	0				0	0	0	0	0	0	0	0	0	0	1	1
Louisiana	0	0	0	0	2	3	71	136	283	137	255	303	460	254	336	356	2, 596
Maine[3]										0	0	3	0	0	0	0	3
Massachusetts[4]										0	0	11	0	6	0	0	71
Michigan[4]											0	3	0	0	0	0	3
Mississippi	0	0	0	0	4	28	221	68	66	41	107	152	114	123	112	153	1, 189
New Hampshire[4]										0	0	0	0	0	0	0	0
New Mexico[3]											0	65					65
New York[3]						0	4			84	78	106	96	72	27	25	492
Oklahoma[3]											0	1	0	0			1
North Carolina[3]	0	0	0	0	0	2	75	28	35	54	293	125	183	156	89	158	1, 198
South Carolina	0	25	52	37	80	114	160	117	135	221	201	419	299	212	138	192	2, 402
South Dakota											0	0	0	2	4	0	7
Texas											249	4, 694	1, 735	2, 425	2, 917	4, 188	16, 208
Virginia	0	0	0	11	0	46	344	181	123	186	259	301	434	314	267	464	2, 930
Wyoming[3]							0	0	0	1	0	0	0	0	0	0	1
Total	1	26	52	110	134	255	1, 118	942	850	988	2, 078	7, 472	4. 007	4, 675	4, 750	7, 340	34, 798

[1] Entire State covered 1965–68; selected election districts covered 1970–72; since 1975 entire State covered.

[2] Selected county (counties) until 1975; entire State now covered.

[3] Selected county (counties) covered rather than entire State.

[4] Selected town (towns) covered rather than entire State.

Leaders (____) indicates years not covered.

Source: U.S. Department of Justice.

TABLE 2.—NUMBER OF CHANGES [1] TO WHICH OBJECTIONS HAVE BEEN INTERPOSED BY STATE AND YEAR, 1965 TO FEB. 28, 1981

State	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1970	1981	Total
Alabama					10	1	3	9	1	6	16	16	1	3	1	5		72
Alaska																		0
Arizona									1		2	2				3		8
California												3	2					5
Colorado																		0
Connecticut																		0
Florida																		0
Georgia				6			12	18	15	22	83	12	34	8	5	10	1	226
Hawaii																		0
Idaho																		0
Louisiana					2		36	13	6	10	5	52	1	3		8		136
Maine																		0
Massachusetts																		0
Michigan																	1	0
Mississippi					4	1	19	4	7	2	17	7	8	2	3	3		78
New Hampshire																		0
New Mexico																		0
New York										4	1							5
Oklahoma																		0
North Carolina							10				8		37	3	1	3		62
South Carolina								7	7	26	4	11	8	7	7			77
South Dakota														1	1			2
Texas											1	48	13	22	26	18	2	130
Virginia						1	6	1		3	1				1	1		14
Wyoming																		0
Totals	0	0	0	6	16	3	86	52	37	73	138	151	104	49	45	51	4	815

[1] Some submissions include more than 1 change affecting voting. Thus the number of changes to which objections have been interposed exceeds the number of submissions which have resulted in objections.

Source: U.S. Department of Justice.

TABLE 3.—NUMBER OF CHANGES SUBMITED UNDER SEC. 5 AND REVIEWED BY THE DEPARTMENT OF JUSTICE, BY TYPE AND YEAR, 1965 TO DEC. 31, 1980

Type of change	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	Total
Redistricting		2	4		12	25	201	97	47	55	53	335	79	48	53	85	1,096
Annexation		1	2		2	6	256	272	242	244	571	1,499	939	880	1,130	1,205	7,249
Polling place		2	4	4	7	28	174	127	131	154	403	1,983	844	1,402	1,122	3,058	9,488
Precinct		2	9	7	11	22	144	69	55	81	82	608	266	299	542	982	3,179
Reregistration [1]			1			2	52	15	6	4	46	147	366	162	271	5	1,077
Incorporation			1				4	1	3	1	5	15	12	5	11	58	116
Election law [2] [3]	1	18	24	96	67	105	226	332	258	422	620	1,831	1,094	1,450	1,230		7,774
Bilingual											22	781	171	280	294	201	1,749
Miscellaneous [4]				3	14	8	15	26	99	12	65	168	150	65	68	284	977
Not within the scope of section [3] [5]		1	7		21	59	46	3	9	15	206	105	86	84	29		671
Mehtod of election [5]																196	196
Form of government [5]																41	41
Consolidation or division of political units [5]																14	14
Special election [5]																369	369
Voting methods [5]																93	93
Candidate qualification [5]																11	11
Voter registration procedure [5]																738	738
Total	1	26	52	110	134	255	1,118	942	850	988	2,078	7,472	4,007	4,675	4,750	7,340	34,798

[1] Modified in 1980; does not include other registration procedures listed above.

[2] Ordinance or other legislation affecting election laws; this category was replaced in 1980 by several others. See p. 2.

[3] Not used in 1980.

[4] Miscellaneous change not included in the above classifications.

[5] New computer classifications beginning in 1980.

Source: U.S. Department of Justice.

Note: These figures are based on computer tabulations. The computer program is limited to the above general classifications.

TABLE 4.—NUMBER OF CHANGES SUBMITTED UNDER SEC. 5 TO WHICH OBJECTIONS BY DEPARTMENT OF JUSTICE WERE INTERPOSED, BY TYPE OF CHANGE, 1975–80

Type of change	Objections	
	Number	Percent
Annexations	235	30.5
At-large elections	80	10.4
Majority vote	66	8.6
Numbered posts	60	7.8
Redistricting/boundary changes	56	7.3
Polling place changes	55	7.2
Residency requirements	42	5.5
Staggered terms	36	4.7
Single-member districts	26	3.4
Changes in number of positions	15	1.9
Multimember districts	13	1.7
Registration and voting procedures	13	1.7
Requirements for candidacy	12	1.6
Election date change	11	1.4
Change in terms of office	8	1.0
Bilingual procedures	8	1.0
New voting precinct	6	.8
Consolidation and incorporation	6	.8
Change from appointive to elective/elective to appointive	3	.4
Miscellaneous	19	2.5
Total	770	100.0

Note: The above figures count each element of an objection separately. For instance, if the Department of Justice objected to a proposed change of 7 polling places, this was counted as 7 proposed changes, but the Department of Justice data counted it as 1 objection. The total number of proposed changes in this is therefore larger than the total number of objections from the Department of Justice data above. The above figures do not include objections subsequently withdrawn.

Source: U.S. Commission on Civil Rights analysis of Department of Justice objection letters.

TABLE 5.—COUNTIES DESIGNATED FOR FEDERAL EXAMINERS AND NUMBER OF PERSONS LISTED BY EXAMINERS

State and county	Date of designation	Net number of persons listed
Alabama:		
Autauga	Oct. 29, 1975	1,330
Bullock [1]	Nov. 6, 1978	
Choctaw [1]	May 30, 1966	
Conecuh [1]	Aug. 28, 1980	
Dallas	Aug. 9, 1965	8,418
Elmore	Oct. 29, 1965	1,792
Greene	do	1,639
Hale	Aug. 9, 1965	2,769
Jefferson	Jan. 20, 1966	20,560
Lowndes	Aug. 9, 1965	3,030
Marengo	do	5,076
Montgomery	Sept. 29, 1965	9,731
Perry	Aug. 18, 1965	2,035
Pickens [1]	Sept. 1, 1978	
Russell [1]	Sept. 25, 1978	
Sumter	May 2, 1966	25
Talladega [1]	Oct. 31, 1974	
Wilcox	Aug. 18, 1965	3,326
Total		59,731
Georgia:		
Baker [1]	Nov. 4, 1968	
Bulloch [1]	July 30, 1980	
Burke [1]	Nov. 7, 1978	
Calhoun [1]	July 30, 1968	
Early [1]	do	
Hancock [1]	Nov. 7, 1966	
Johnson [1]	July 30, 1980	
Lee	Mar. 23, 1967	475
Meriwether [1]	Aug. 8, 1976	
Mitchell [1]	July 30, 1980	
Peach [1]	Nov. 4, 1972	
Screven	Mar. 23, 1967	1,448
Stewart [1]	Aug. 3, 1976	
Sumter [1]	July 30, 1980	
Taliaferro [1]	Nov. 4, 1968	
Telfair [1]	July 30, 1980	
Terrell	Mar. 23, 1967	1,465
Tiff [1]	July 30, 1980	
Twiggs [1]	Sept. 3, 1974	
Total		3,388

TABLE 5.—COUNTIES DESIGNATED FOR FEDERAL EXAMINERS AND NUMBER OF PERSONS LISTED BY EXAMINERS—Continued

State and county	Date of designation	Net number of persons listed
Louisiana:		
Bossier	Mar. 23, 1967	1, 182
Caddo	do	3, 084
De Soto	do	1, 843
East Carroll	Aug. 9, 1965	1, 618
East Feliciana	do	1, 222
Madison	Aug. 12, 1966	528
Ouachita	Aug. 18, 1965	4, 677
Plaquemines	Aug. 9, 1965	1, 768
Sabine [1]	Sept. 27, 1974	------
St. Helena [1]	Aug. 16, 1972	------
St. Landry [1]	Dec. 5, 1979	------
West Feliciana	Oct. 29, 1965	93
Total		16, 015
Mississippi:		
Amite	Mar. 23, 1967	379
Benton	Sept. 24, 1965	335
Bolivar [1]	do	------
Carroll	Dec. 20, 1965	849
Claiborne	Apr. 12, 1966	1, 154
Clay	Sept. 24, 1965	1, 161
Coahoma	do	3, 545
Covington [1]	Aug. 6, 1979	------
De Soto	Oct. 29, 1965	808
Forest	June 1, 1967	160
Franklin	Mar. 23, 1967	47
Greene [1]	Aug. 6, 1979	------
Grenada	July 20, 1966	886
Hinds	Oct. 29, 1965	13, 170
Holmes	do	3, 950
Humphreys	Sept. 24, 1965	1, 733
Issaquena	June 1, 1967	26
Jasper	Apr. 12, 1966	614
Jefferson	Oct. 29, 1965	1, 756
Jefferson Davis	Aug. 18, 1965	1, 130
Jones	do	1, 906
Kemper [1]	Oct. 31, 1974	------
Leflore	Aug. 9, 1965	4, 547
Madison	do	7, 070
Marshall	Aug. 5, 1967	95
Neshoba	Oct. 29, 1965	743
Newton	Dec. 20, 1965	639
Noxubee	Apr. 12, 1966	378
Oktibbeha	Mar. 23, 1967	324
Pearl River	Apr. 29, 1974	181
Quitman [1]	Oct. 29, 1980	------
Rankin	Apr. 12, 1966	1, 061
Sharkey	June 1, 1967	366
Simpson	Dec. 20, 1965	1, 062
Sunflower [1]	Apr. 29, 1967	------
Tallahatchie	Aug. 14, 1971	79
Tunica [1]	Oct. 31, 1975	------
Walthall	Oct. 29, 1965	1, 075
Warren	Dec. 20, 1965	1, 649
Wilkinson	Aug. 5, 1967	125
Winston	Apr. 12, 1966	25
Yazoo [1]	Oct. 28, 1971	------
Total		53, 028
South Carolina:		
Clarendon	Oct. 29, 1965	3, 413
Darlington [1]	Nov. 6, 1978	------
Dorchester	Oct. 29, 1965	1, 169
Marion [1]	June 26, 1978	------
Total		4, 582
Texas:		
Atascosa [1]	Oct. 29, 1980	------
Bee [1]	Oct. 29, 1976	------
Crockett [1]	Aug. 11, 1978	------
El Paso [1]	Nov. 6, 1978	------
Fort Bend [1]	Apr. 28, 1976	------
Frio [1]	Oct. 29, 1976	------
La Salle [1]	do	------
Medina [1]	Apr. 28, 1976	------
Reeves [1]	May 5, 1978	------
Uvalde [1]	Apr. 28, 1976	------
Wilson [1]	do	------

[1] No examiners were sent to these counties.

Sources: U.S. Department of Justice; Civil Rights Division, Voting Section, "Counties Designated as Examiner Counties" (Mar. 9, 1981); and U.S. Office of Personnel Management, "Cumulative Totals on Voting Rights Examining" (Dec. 31, 1980)

NOTES

1. 71 Stat. 634.

2. 74 Stat. 90.

3. 78 Stat. 241.

4. *See*, e.g., *United States v. Raines*, 362 U.S. 17 (1960) involving racial discrimination by the voter registrar of Terrell County, Georgia.

5. Hearings on H.R. 6400 Before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 2, 5 (1965).

6. Hearings on H.R. 6400 *supra*, 4.

7. 79 Stat. 437, 42 U.S.C. Sections 1973 *et seq.*

8. Protected language minorities are American Indians, Asian Americans, Alaskan natives and those of Spanish heritage. 42 U.S.C. Section 1973aa–2(e).

9. 42 U.S.C. Section 1973.

10. 42 U.S.C. Section 1973aa.

11. 42 U.S.C. Sections 1973r and 1973j.

12. 42 U.S.C. Section 1973aa–1(b).

13. 42 U.S.C. Section 1973c.

14. 42 U.S.C. Section 1973b(b).

15. Section 5 coverage is determined by the Attorney General and the Director of Census, and is published in the Code of Federal Regulations, 28 C.F.R. Part 51. The complete list of covered jurisdictions is:
Alabama (entire state);
Alaska (entire state);
Arizona (entire state);
California (4 counties: Kings, Merced, Monterey and Yuba);
Colorado (1 county: El Paso);
Connecticut (3 towns: Groton, Mansfield and Southbury);
Florida (5 counties: Collier, Hardee, Hendry, Hillsborough and Monroe);
Georgia (entire state);
Hawaii (1 county: Honolulu);
Idaho (1 county: Elmore);
Louisiana (entire state);
Massachusetts (9 towns: Amherst, Ayer, Belchertown, Bourne, Harvard, Sandwich, Shirley, Sunderland, and Wrentham);
Michigan (2 towns: Buena Vista, Clyde);
Mississippi (entire state);
New Hampshire (10 towns: Antrim, Benton, Boscawen, Millsfield Township, Newington, Pinkhams, Grant, Rindge, Stewartstown, Stratford, and Unity);
New York (3 counties: Bronx, Kings, and New York);
North Carolina (39 counties: Anson, Beaufort, Bertie, Bladen, Camden, Caswell, Chowan, Cleveland, Craven, Cumberland, Edgecombe, Franklin, Gates, Gaston, Granville, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Jackson, Lee, Lenoir, Martin, Nash, Northampton, Onslow, Pasquotank, Perquimans, Person, Pitt, Robeson, Rockingham, Scotland, Union, Vance, Wake, Washington, Wayne, and Wilson);
South Carolina (entire state);
South Dakota (2 counties: Shannon and Todd);
Texas (entire state);
Virginia (entire state);
Wyoming (1 county: Campbell).

16. *Beer v. United States*, 425 U.S. 130 (1976).

17. *See, e.g., Allen v. State Board of Elections*, 393 U.S. 544 (1969); *Perkins v. Matthews*, 400 U.S. 1979 (1971); and *Dougherty County v. White*, 439 U.S. 32 (1978).

18. *City of Rome v. United States*, 446 U.S. 156, 174 (1980), quoting from *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

19. 42 U.S.C. Sections 1973d and f.

20. U.S. Commission on Civil Rights: The Voting Rights Act: Unfulfilled Goals (1981), 270–71.

21. Ibid., 268–69.

22. 42 U.S.C. Sections 1973a(a) and (c).

23. U.S. Commission on Civil Rights, *supra*, 23.

24. *McMillan v. Escambia County*, Civ. No. 77–0432 (N.D. Fla. Dec. 3, 1979, Feb. 27, 1979); *Jenkins v. City of Pensacola*, Civ. No. 77–0433 (N.D. Fla. Jan. 23, 1979).

25. 42 U.S.C. Sections 1973b and 1973aa–1a.

26. The current list of jurisdictions is set out in 28 C.F.R., Par. 55.

27. 42 U.S.C. Section 1973b.

28. *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966).

PROGRESS UNDER THE VOTING RIGHTS ACT

The Voting Rights Act of 1965 has had an undeniable effect in Southern jurisdictions measured by the increase in black voter registration and black elected officials. Less than 300 blacks held office in all the Southern states before the Act was adopted. Today, the figure stands at more than 2,400. [1] One hundred eighteen blacks serve as mayors, 15 as state senators, 112 as state representatives, and 361 on county governing boards. [2] Table A shows the number of black elected officials by positions held in those Southern states covered by Section 5. More blacks hold office in Mississippi—387—than in any Southern state. The fewest number of black elected officials are in Virginia, which has 124.

Although the raw numbers sound impressive, blacks remain a disproportionately low number of all office holders. In Georgia, for example, in 1980, the 249 black elected officials were only 3.7 percent of the total of elected officials, yet the state is 26.2 percent black. In Alabama, the 238 black elected officials were 5.7 percent of the total. The state, however, is 24.5 percent black. In South Carolina, blacks were 7.4 percent of the elected officials, but 31 percent of the population. [3] As Table B illustrates, in none of the Southern states covered by Sections 5 are blacks elected to office in numbers approaching their presence in the population.

The under-representation of blacks is more apparent in higher elected offices. Only one black from Southern Section 5 jurisdictions serves in Congress. Conversely, more than 40 percent of all black elected officials serve as members of governing bodies of municipalities, many of which are small and majority black. Table C shows black elected officials as the percentage of all elected officials by positions held in covered jurisdictions.

Voter registration also remains lower for blacks than whites. According to the Census, which collected registration data in 1976 in states covered by the Voting Rights Act, 75.4 percent of whites but only 58.1 percent of blacks were registered in Alabama. In Georgia, 73.2 percent of whites but only 56.3 percent of blacks were registered. In South Carolina, 64.1 percent of whites and 60.6 percent of blacks were registered. For the other covered states, the figures are similar.[4] See Table D. More recent figures for South Carolina show 56.5 percent of whites and 50.9 percent of blacks registered to vote.[5]

Progress has been made under the Voting Rights Act of 1965, but the fact remains that blacks still lag far behind whites in office holding and voter registration, two reliable indices of effective political participation. Some of the causes of the failure to realize the goal of equal voting will be discussed in the following chapters of this report.

NOTES

1. New York Times, "Once Again, A Clash Over Voting Rights," September 27, 1981, 104.
2. *Ibid.*
3. Source: Joint Center for Political Studies, *National Roster of Black Elected Officials*, Vol. 10, 1981.
4. U.S. Department of Commerce, Bureau of the Census, *Registration and Voting in November, 1976—Jurisdictions Covered by the Voting Rights Act Amendments of 1975*, Series P–23, No. 74, 1978, Tables 1 and 2.
5. U.S. Department of Commerce, Bureau of Census, *Projections of the Population of Voting Age for States: November 1980*, Series P–25, No. 879, Table 1.

TABLE A.—BLACK ELECTED OFFICIALS IN SOUTHERN STATES COVERED UNDER THE PRECLEARANCE PROVISIONS OF THE VOTING RIGHTS ACT, JULY 1980

	U.S. Congress		State legislature		County offices				Municipal offices					
	Senate	House	Senate	House	County governing board	Law enforcement officials	County school board	Other positions	Mayor	Governing body	City school board	Other	Other officials	Total
Alabama	0	0	2	13	18	40	23	9	16	110	2	5	0	238
Georgia	0	0	2	21	20	8	31	5	7	139	12	4	0	249
Louisiana	0	0	2	10	85	34	87	1	12	119	4	8	1	363
Mississippi	0	0	2	15	27	77	45	34	17	143	13	14	0	387
North Carolina [1]	0	0	1	4	18	7	42	2	13	136	16	3	5	247
South Carolina	0	0	0	14	34	20	47	5	13	86	9	1	9	238
Texas	0	1	0	13	5	18	[2] 77	0	5	68	0	5	4	196
Virginia	0	0	1	4	34	5	([3])	3	5	71	([3])	1	0	124
Total	0	1	10	94	241	209	352	59	88	872	56	41	19	2,042

[1] Statewide data, including the 40 counties subject to preclearance.
[2] School board members elected in independent school districts.
[3] Not an elective position.

Source: Joint Center for Political Studies, "National Roster of Black Elected Officials," vol. 10 (1981). Data on Virginia supplied by Virginia State Conference NAACP.

TABLE B.—BLACKS AS PERCENTAGE OF POPULATION AND ELECTED OFFICIALS IN SOUTHERN STATES COVERED UNDER THE PRECLEARANCE PROVISIONS OF THE VOTING RIGHTS ACT, JULY 1980

State	Population percent black, 1980	Elected officials		
		Total officials	Black officials	
			Number	Percent of total
Alabama	25.6	4,151	238	5.7
Georgia	26.8	6,660	249	3.7
Louisiana	29.4	4,710	363	7.7
Mississippi	35.2	5,271	387	7.3
North Carolina [1]	22.4	5,295	247	4.7
South Carolina	30.4	3,225	238	7.4
Texas	15.3	24,728	196	.8
Virginia	18.9	3,041	124	4.1

[1] Statewide data, including the 40 counties subject preclearance.

Source: Joint Center for Political Studies, "National Roster of Black Elected Officials," vol. 10 (1981). Data on Virginia supplied by Virginia State Conference NAACP.

TABLE C.—BLACK ELECTED OFFICIALS AS PERCENTAGE OF ALL ELECTED OFFICIALS IN SOUTHERN STATES COVERED UNDER THE PRECLEARANCE PROVISIONS OF THE VOTING RIGHTS ACT, JULY 1980

State	U.S. Congress		State legislature		County governing body	Local school board	Municipal governing board	Population percent black, 1980
	Senate	House	Senate	House				
Alabama	0	0	5.7	12.4	6.6	7.1	5.3	25.6
Georgia	0	0	3.6	11.7	3.4	5.9	5.2	26.8
Louisiana	0	0	5.1	9.5	13.2	13.4	9.4	29.4
Mississippi	0	0	3.8	12.3	6.6	10.3	10.4	35.2
North Carolina [1]	0	0	2.0	3.3	3.7	7.4	6.0	22.4
South Carolina	0	0	0	11.3	11.7	11.6	6.7	30.4
Texas	0	4.2	0	8.7	.5	1.0	1.4	12.0
Virginia	0	0	2.5	4.0	6.8	(2)	5.2	18.9

[1] Statewide data, including the 40 counties subject to preclearance.

[2] Not an elective position.

Sources: U.S. Department of Commerce, Bureau of the Census, "Popularly Elected Officials." vol. 1. No. 2 (1979)' GC77(1)-2; and Joint Center for Political Studies, "National Roster of Black Elected Officials," vol. 10 (1981). Data on Virginia supplied by Virginia State Conference NAACP.

TABLE D.—PERCENTAGE OF VOTING AGE POPULATION REPORTED REGISTERED IN JURISDICTIONS COVERED BY SEC. 5 OF THE VOTING RIGHTS ACT, BY RACE AND ETHNICITY, 1976

State	Percent reported registered, 1976			
	White	Black	Hispanic	American Indian/Alaskan Native
Alabama	75.4	58.1	(1)	(1)
Alaska	73.0	(1)	(1)	62.8
Arizona	71.5	(1)	60.9	48.0
California [2]	65.3	(1)	49.5	(1)
Colorado [2]	68.1	(1)	52.8	(1)
Florida [2]	66.5	(1)	63.7	(1)
Georgia	73.2	56.3	(1)	(1)
Louisiana	78.8	63.9	(1)	(1)
Michigan [3]	63.7	(1)	52.4	(1)
Mississippi	77.7	67.4	(1)	(1)
New York [2]	69.8	(1)	51.4	(1)
North Carolina [2]	63.1	48.2	(1)	65.6
South Carolina	64.1	60.6	(1)	(1)
South Dakota [2]	77.3	(1)	(1)	52.7
Texas	69.4	64.0	61.1	(1)
Virginia	67.0	60.7	(1)	(1)

[1] Group not covered under sec. 5.

[2] Selected county (counties) subject to preclearance rather than entire State

[3] Selected towns subject to preclearance rather than entire State.

Source: U.S., Department of Commerce, Bureau of the Census, "Registration and Voting in November 1976—Jurisdictions Covered by the Voting Rights Act Amendments of 1975," series P-23, No. 74 (1978), tables 1 and 2.

CONTINUING BARRIERS TO EQUAL POLITICAL PARTICIPATION

The goal of the civil rights movement, as far as voting rights were concerned, was to remove the discriminatory registration and other procedures which had excluded blacks from the electorate, and to devise a means to block the enactment of new, equally discriminatory procedures to take their place. It was largely assumed, or at least hoped, that once the formal barriers to registration were permanently thrown down, blacks would participate in politics on a basis of equality with whites. But that didn't happen, despite the ban on tests or devices for registration and the requirement of pre-clearance of new election laws contained in the Voting Rights Act of 1965.

First, many jurisdictions ignored Section 5 and adopted new procedures to blunt increased black voter registration.

Second, many jurisdictions used voting procedures, such as at-large elections, enacted before November 1, 1964, the operative date for pre-clearance under Section 5, which perpetuated the effects of past discrimination.

Third, the heritage of separate-but-equal was far more debilitating than had been supposed—indeed if that were possible. Black candidates for office were devastated by racial bloc voting by whites; chronically low black voter registration; sheer inexperience in the political process; and, a depressed, distinctive socio-economic status which made it difficult, if not impossible, to form political coalitions with whites or participate effectively in the electorate.

Finally, the tactics of poltical intimidation and manipulation were not placed on the scrap heap merely by passage of legislation in Washington.

I. SECTION 5 NON-COMPLIANCE

The level of non-compliance with Section 5 by Southern jurisdictions has been nothing short of spectacular. According to a study by the Southern Regional Council, more than 350 election law changes have been enacted and are currently being applied in Georgia without ever having been pre-cleared. See Table E. In South Carolina, there are 108; in North Carolina 160; in Louisiana 38; and in Alabama 68.

Congress, to be sure, did not intend for covered jurisdictions simply to ignore the requirements of pre-clearance. It placed the initial burden of "voluntary" Section 5 compliance upon the affected jurisdictions,[1] but authorized the Attorney General, as well as private aggrieved citizens, to enjoin the use of any uncleared voting changes through lawsuits filed before special district courts of three judges in the covered jurisdictions.[2]

In order that the judicial enforcement procedure be as effective and expeditious as possible, Congress limited the issues the three-judge court could consider to whether the jurisdiction is covered, whether the change is one affecting voting, and whether there has been pre-clearance. If both the jurisdiction and change are covered, and if there has been no pre-clearance, the three-judge court *must* enjoin enforcement. The local court has no jurisdiction to consider whether the change has a discriminatory purpose or effect, since these are questions which can be decided only by the Attorney General or the federal courts in the District of Columbia.[3]

CHART NO. 1

TABLE E.—REVIEW OF STATE ACTS FROM 1965 TO 1980 AFFECTING VOTING AND NOT SUBMITTED TO U.S. DEPARTMENT OF JUSTICE IN 5 SOUTHERN STATES UNDER THE VOTING RIGHTS ACT

State	Total counties in State	Total counties covered by V.R.A.	Non-submitted State acts	Non-submitted acts affecting the State at large	Non-submitted acts affecting only certain counties	Counties affected by local non submitted acts
Alabama	67	67	68	46	22	6
Georgia	159	159	361	45	316	81
Louisiana	64	64	38	25	13	4
North Carolina	100	39	160	1	159	31
South Carolina	46	46	108	2	106	16
Total	436	375	735	119	616	138

[1] All listings of information relating to North Carolina are tentative.

Source: Prepared by Southern Regional Council, Atlanta, Ga.

Congress also made it a crime to fail to comply with pre-clearance.[4] But in spite of widespread non-compliance with Section 5, there has never been a prosecution for this offense. Given the history of voter fraud in the covered jurisdictions, it is not surprising that discrimination against blacks in the electorate is still not regarded officially as criminal activity.

1. At-Large Elections

A favorite way of circumventing Section 5, with devastating impact upon blacks, has been to change the method of holding elections from districts to at-large in jurisdictions with significant black populations. The effect of such changes is to throw black concentrations of population in individual districts into countywide white majorities, depriving blacks of any opportunity to elect candidates of their choice.

The significance of at-large voting was shown in a survey of elected county officials in Georgia conducted by the Southern Regional Office of the ACLU in 1980. The survey revealed that of 18 blacks elected to county governments, 16 (only about 3 percent of all such officeholders) ran in either majority black districts or counties.[5] Blacks in Georgia's majority white counties or districts, for all practical purposes, cannot get elected to office.

The Supreme Court commented in a 1969 case upon the potential for discrimination inherent in at-large voting and why its adoption might be objectionable under Section 5:

"Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting."[6]

Political scientists have similarly identified and condemned the discriminatory aspect of at large voting.[7]

(*a*) *Georgia Counties.*—On November 1, 1964, the date upon which preclearance began in most of the covered jurisdictions, the following counties in Georgia, among others, had district elections for their county government: Calhoun (63 percent black), Clay (61 percent black), Dooly (50 percent black), Early (45 percent black), Miller (28 percent black), Morgan (45 percent black), Newton (31 percent black), and Seminole (35 percent black). There were no black elected officials on any of the eight county governments. The Voting Rights Act promised to change that by creating black registered voter majorities in some of the single member districts. But by 1971, each county, with the exception of Seminole, adopted at-large voting plans—and not a single one complied with Section 5.

Between 1976 and 1980, six of these jurisdictions had to be sued: Calhoun,[8] Clay,[9] Dooly,[10] Early,[11] Miller,[12], and Morgan,[13] and in each case federal courts ordered the defendants to obtain pre-clearance of their current plans, or return to district elections. All now have district voting plans.

Newton County, under threat of litigation, submitted its at-large plan to the Department of Justice in 1975. There was an objection and the county was forced to return to districts for election of the local government. The Board of Education of Newton County also adopted at-large voting in 1971, but made no effort to pre-clear the change. Rather than face litigation, it followed the lead of the Board of Commissioners and adopted the same district lines for school board elections.

Seminole County had voting districts prior to the Voting Rights Act, but they were drawn in 1933. By 1980, the district encompassing the county seat of Donalsonville, which contained 40 percent of the county's population and its largest concentration of blacks, had over 2,200 voters. By contrast, the Rock Pond district, which also elected one member to the county government, had only 170 registered voters. The county refused to redistrict, a procedure which would have involved the section 5 submission of any reapportionment plan. Lawsuit was filed in April, 1980, and the court ordered the county to reapportion. [14] At the next election, Donald Moore, a black school teacher, was elected to county government from the town of Donalsonville.

(*b*) *Pickens County, Alabama.*—The Pickens County, Alabama Board of Education suddenly switched in 1966 from district to at-large elections just as blacks began registering to vote in substantial numbers. No submission of the change was made until a lawsuit to enforce Section 5 was filed in the district court in 1973. [15] The attorney general objected to the plan and a new apportionment utilizing single member districts was implemented.

Of equal significance as the discriminatory changes in covered jurisdictions to at-large elections is the complete absence of any complimentary effort to facilitate black political participation. No known jurisdiction with at-large voting voluntarily changed to districts after enactment of the Voting Rights Act to allow newly enfranchised blacks an opportunity to elect representatives of their choice to office. The record shows that the response to the Voting Rights Act, to the extent that there was one, was invariably of opposition.

2. *Majority Vote*

Majority vote requirements are a favored way of disadvantaging minorities in the electorate. In races with one black and several white candidates, a black conceivably can get a plurality if the white candidates split the white vote. But under a majority vote rule, any black plurality winner is required to enter a subsequent run-off election against the next highest voter getter, which generally means defeat at the hands of the regrouped white voter majority. In the words of the Supreme Court, majority vote requirements, while not per se unconstitutional, "enhance the opportunity for racial discrimination." [16] Not surprisingly, many covered jurisdictions with plurality systems implemented majority vote requirements after November 1, 1964 to blunt black voter registration under the Voting Rights Act. Since 1975 the Attorney General has objected to majority vote requirements under Section 5 on 66 different occasions.

(*a*) *Moultrie, Georgia.*—The first blacks to run for city office in Moultrie, Georgia, were Frank Burke, for city council, and Edward Starkey, for the city school board in 1964. At that time, a plurality requirement was in effect for the city. Burke received 458 votes, the fourth highest number in a field of six candidates running for three council seats. Starkey received 434 votes and finished last in a field of three.

The very next year, 1965, the method of elections for city councils was changed to provide for election by majority vote. The change was not submitted for preclearance.

In 1973, John Cross, the black owner of a local cab company, ran for the council and received a plurality of votes. He was forced into an illegal run-off and was soundly beaten.

The majority vote change was finally submitted in 1977, after the city had been sued by Cross and others for failure to comply with Section 5.[17] The Attorney General objected on June 26, 1977 because "bloc voting along racial lines may exist" in Moultrie, and the majority vote requirement "may have the effect of abridging minority voting rights."[18] At the next elections a black man, Frank Wilson, entered the race for a council seat against four whites. Due to the splintering of the white vote, Wilson received a plurality and was elected to office.

(*b*) *Americus, Georgia.*—In Americus, Georgia, the method of holding elections for the mayor and council was changed from plurality to majority vote in 1968. No pre-clearance was sought.

Prior to the Voting Rights Act, only 548 blacks were registered to vote in all of Sumter County, to which Americus is the County seat, 8.2 percent of the eligible population. Sumter County is 44 percent black.

The majority vote requirement was used on two occasions, October, 1972, and October, 1977, to exclude plurality winning blacks (Willie Pascal and Raymond Green) from office. The city subsequently reapportioned itself into districts following a federal court order finding its at-large elections discriminatory,[19] and the plaintiffs withdrew their objection to the majority vote requirement.

(*c*) *Jackson, Georgia.*—The Democratic Party in Jackson, Georgia, the only party which conducts primaries, adopted a majority vote requirement after passage of the Voting Rights Act but failed to seek preclearance. On September 17, 1981, a federal court enjoined the change pending submission to the Attorney General.[20]

(*d*) *Covington, Georgia.*—Covington, Georgia is a town of 10,267 people, 44% of whom are black. In 1962 its government consisted of a mayor and six councilmen elected by plurality vote to staggered terms of office.

In 1962, race was largely academic, for only 901 blacks were registered in all of Newton County, of which Covington is the county seat. And no black had ever been elected to city office. Following passage of the Voting Rights Act, black voter registration sharply increased. By August, 1967, there were more than 2,000 blacks on the county voters list.

In that same year, the city charter was amended providing for a numbered post system and a majority vote and run-off requirement. Although the amendment was a change in voting required to be pre-cleared, the city made no attempt to comply with Section 5 of the Voting Rights Act.

In 1975, after preparation of a lawsuit, local blacks made a formal request of city officials to submit the numbered post and majority vote provisions. A submission to the Attorney General was made in April of that year and blacks urged that an objection be entered. The Attorney General, on August 26, 1975, objected to the changes.

(e) *St. Marys, Georgia.*—The mayor and six member council of St. Marys, Georgia were elected by plurality vote prior to the Voting Rights Act. In 1967, a majority vote requirement was implemented for all city officials, but no attempt was made to pre-clear the changes under Section 5. Local blacks filed suit in November, 1981 to enjoin use of the changes absent pre-clearance. [21]

3. *Change from Appointed to Elected Bodies.*

A number of jurisdictions which had appointed governing bodies in 1964 switched to elections without bothering to seek pre-clearance. The change can make it more difficult for blacks to hold office, particularly where the elections are at-large and blacks have some influence upon, or access to, the appointive process.

(a) *Terrell County, Georgia.*—In Terrell County, Georgia, the Board of Education was traditionally appointed by the grand jury, which was selected from the list of registered voters and was, until the mid-1960's, all white. After blacks began to register in some numbers and gain access to jury service, the method of selecting the Board of Education was changed from appointment to election at-large. No pre-clearance was sought and local officials held illegal elections at-large from 1968 through 1978. No blacks were elected, even though 90% of county public schools pupils were black.

A lawsuit was filed in 1976 seeking compliance with Section 5; a submission was made; and the Attorney General objected to the at-large elections. [22] The county returned to grand jury appointment, and thereafter, a grand jury from which blacks were not excluded appointed five new members to the board. Two of the new members were black.

(b) *Edgefield County, South Carolina.*—Edgefield County, South Carolina, is another jurisdiction with a substantial black population (50%) which changed an appointed system of government to one elected at-large in 1966 without securing Section 5 pre-clearance.

During Reconstruction, blacks participated fully in Edgefield County politics. By the mid-1870's, the county senator, county representatives, county commissioners, coroner, sheriff, probate judge, school commissioners, and clerk of court were blacks. Blacks served on the school board, as magistrates, solicitors, wardens, and at every level of city and county government.

After Reconstruction, as we have seen, blacks were effectively excluded from politics in Edgefield and the state. Prior to adoption of the discriminatory registration procedures of 1894, B. R. Tillman, a native of Edgefield and principal architect of disfranchisement, secured passage during his second term as governor in 1894, of state legislation abolishing local elected governments. His purpose was to put it beyond possibility that blacks, even in places where they were a majority, could exercise local control.

County and township commissioners were required to be appointed by the governor upon the recommendation of the local senator and representatives, political offices that had been successfully "redeemed" by White Democrats. All powers to tax, borrow money, appoint local boards and exercise eminent domain were reserved for the state legislature. During the time the appointment system was in effect in Edgefield County, not a single black was appointed to the county government.

In 1966, the appointment system was changed to require members of the county council to be elected at-large, but was never submitted for pre-clearance under Section 5. The change was doubtlessly regressive, for it is unlikely that the Governor, given the increased black voter registration in Edgefield County under the Voting Rights Act, could fail to appoint one or more blacks to the five member council. Under the uncleared at-large plan, no black has ever been elected to office. A lawsuit to require pre-clearance of the 1966 change is now pending in federal district court. [23]

(*c*) *Harris County, Georgia.*—The first blacks to serve on the Harris County, Georgia Board of Education were appointed in 1974 by a recently desegregated grand jury. That same year, county officials secured passage of a law requiring the Board to be elected at-large. No black in Harris County, however, has ever been elected to any position at-large.

The Attorney General objected to the change, indicating that if a non-dilutive method of elections, such as districts, was adopted, the objection would be withdrawn:

Minority candidates have not been able to become elected to any countywide office in Harris County because of the county's system of at-large elections. The use of an at-large system under these circumstances has the discriminatory effect of diluting the ability of minority candidates to participate as members of the Board of Education. [24]

The Board asked for reconsideration of the at-large plan, representing that the two black members "were in favor of the bill." [25] In fact, they were not. Reconsideration was denied.

(*d*) *Dooly County, Georgia.*—Dooly County, Georgia is 50% black, and until 1967, its five member Board of Education was appointed by the grand jury. In that year, the Georgia General Assembly enacted legislation providing that board members be elected at-large. Though this change was not legally enforceable until it received federal pre-clearance, no pre-clearance was sought and illegal at-large elections for the school board were held from 1968 through 1976. And no blacks were ever elected to office.

Following a Section 5 lawsuit by local blacks, the district court enjoined elections for the school board and provided that local officials had until March, 1981 to seek enactment of a redistricting plan which could receive federal pre-clearance under Section 5. [26]

In February, 1981, the Georgia General Assembly enacted a plan using five single-member voting districts for the Board of Education. Two of the voting districts have black majorities.

(*e*) *Miller County, Georgia.*—Miller County, Georgia abolished its grand jury method of selecting school board members in favor of at-large voting in 1967. No pre-clearance was sought. and illegal elections were held until 1980, when a federal court enjoined continued use of at-large voting.[27] The next year the state General Assembly enacted a redistricting plan for the board utilizing five single-member districts.

(*f*) *Pike County, Georgia.*—Until 1967, the five members of the Pike County, Georgia, Board of Education were appointed by the grand jury. In that year, the General Assembly enacted legislation which provided that members were to be elected from single-member districts.

In 1970, two blacks offered for school board positions from two of the single-member districts. Their candidacies marked the first time in the history of Pike County that blacks had run for countywide office. The two were defeated, but both ran competitive races against their white opponents, and one, Rev. Curtis, was able to reach a run-off election.

Before the next elections the General Assembly again changed the method of electing Board members from single member districts to at-large. Though this change was not enforceable until it received federal pre-clearance, neither state nor local officials sought pre-clearance, and instead held illegal at-large elections in 1972, 1974, and 1976.

In February, 1978, the Department of Justice contacted local officials and requested compliance with Section 5. In October, the 1972 legislation was submitted, but not before at-large voting was illegally used in the August, 1978 primary. In March, 1979, the Attorney General objected to the 1972 change. Notwithstanding the objection, the Georgia General Assembly took no action during its 1980 session to provide an alternative method of electing Pike County school board members.

In February, 1980, five black registered voters and the local NAACP chapter of Pike County brought suit to block further use of the at-large voting.[28] In June, 1980, a three-judge court enjoined use of the 1972 change.

In constructing a remedy for the Section 5 violation, the court ruled that plaintiffs were due a race conscious plan only if they could prove that the 1972 change to at-large voting was done with a racially discriminatory purpose. The court then found that plaintiffs had not carried their burden of proof and adopted the defendants' plan, which contained five majority white single-member districts. The court further ruled that the plan could be used in elections through

1990 without Section 5 pre-clearance. The plaintiffs appealed on February 1, 1981, arguing that the defendants' plan: (1) is required to be pre-cleared, and (2) is inadequate as a remedy for the Section 5 violation.

(*g*) ***Mitchell County, Georgia.***—The Attorney General has not objected to the abolition of appointed bodies when the change has had no discriminatory purpose or effect. Mitchell County, Georgia changed the method of selecting its school board from grand jury appointed to at-large elected in 1970. During the period of grand jury appointment, few blacks served on the grand jury and none on the school board. The change was not submitted until 1979, after a Section 5 enforcement lawsuit was begun.[29] That same year, the Attorney General precleared the change on the theory that elections were not racially regressive when compared to past grand jury appointments.

4. Numbered Posts

Numbered post requirements enhance the opportunity for discrimination because they force candidates to run for individual seats, or posts, rather than for a given number of vacancies. Blacks become isolated in single seat races, which makes it difficult to win office where there is any degree of white bloc voting. The courts have noted the potential which numbered post provisions have for diluting the effectiveness of minority political participation. Because "each candidate must limit his candidacy . . . to a particular place on the ballot, . . . its ultimate effect is to highlight the racial element where it exists." [30]

Since 1975, the Attorney General has objected to 60 submissions involving numbered posts.

(*a*) ***Dawson, Georgia.***—Dawson, Georgia is a majority black town, but in 1970, all elected city officials were white. In that year, the city implemented a requirement that the 6 members of city council run for numbered posts. No attempt to pre-clear the change was made. Numbered posts were used until 1977, when a lawsuit was filed by local blacks, [31] and the federal court enjoined the provision absent compliance with Section 5. The city elected not to submit the change, and abandoned its post system.

(*b*) ***Kingsland, Georgia.***—Prior to the Voting Rights Act, Kingsland, Georgia elected its Mayor and four member council biennially by plurality vote to serve two year terms of office. Kingsland is 34% black. In 1976, without seeking preclearance, the city established a numbered post requirement for council members. A lawsuit to enjoin the use of the uncleared change was filed in November, 1981, and is pending in federal court. [32]

(*c*) ***St. Marys, Georgia.***—The six-member City Council of St. Marys, Georgia was traditionally elected by plurality vote to staggered terms of office. A numbered post provision, coupled with a majority vote requirement, was implemented in 1967, the effect of which was to diminish the impact of minorities in city politics. No effort was made by local officials to comply with Section 5. A lawsuit to enforce the Voting Rights Act filed in November, 1981 is pending in federal court.[33]

5. Staggered Terms

Seaggered terms limit the number of seats to be filled at any given election by having positions expire in different years. Not only are the opportunities for office holding restricted, but the effectiveness of single shot voting by minorities is limited. For a discussion of single shot voting, see page 101. Staggered terms, especially in conjunction with at-large elections and majority vote requirements, are recognized as diminishing the effectiveness of blacks in the electorate. Since 1975, the Attorney General has objected to staggered terms 36 times.

(*a*) ***Peach County, Georgia.***—Peach County, Georgia, a majority black county, staggered the terms of office of its three member commission in 1968. No preclearance of the change was sought. Eight years later, the county was sued, and in February, 1977, a three-judge court enjoined use of the staggered terms. [34] The court, however, refused to cut short the terms of commissioners elected under the uncleared procedure. The plaintiffs appealed and the Supreme Court ruled that the defendants should be given 30 days within which to make a submission, and if approval was denied, the terms of the illegally elected commissioners should be cut short. The county made a submission prior to the 1978 elections, and the Attorney General, without giving any reasons, pre-cleared the change.

(*b*) ***Kingsland, Georgia.***—In addition to establishing a numbered post system, Kingsland, Georgia staggered the terms of office for the City Council in 1976. No attempt was made to comply with Section 5. Federal litigation began in November, 1981, to enforce the Voting Rights Act. [35]

6. Annexation

The Supreme Court held in 1970 that annexations, because of their potential for diluting minority voting strength, must be pre-cleared under Section 5. [36] Discriminatory annexations occur when a municipality brings majority white areas into the city limits, the effect of which is to reduce the overall percent of blacks and thus dilute their voting strength. The dilution effect of annexations is aggravated where voting is at-large and racially polarized. [37]

Discriminatory annexations have drawn more objections from the Attorney General than any other voting change. That does not mean, however, that Section 5 has been used to block needed municipal expansion. To the contrary, the Supreme Court has held that annexations are not objectionable under Section 5 even if they reduce the overall black population, *provided* that minorities are fairly represented in the government of the enlarged city. [38] Annexations are normally approved, for example, where the jurisdiction already has, or agrees to adopt, non-discriminatory districts for election of the post-annexation city government.

(*a*) *Jackson, Georgia.*—Jackson, Georgia has over the years annexed several dozen areas without seeking pre-clearance. More whites than blacks have been annexed, the effect of which has been to maintain a bare numerical superiority of whites. Because of racial bloc voting and the use of at-large elections, no blacks have ever been elected to a city office. On September 17, 1981, after a lawsuit was filed by local blacks, a federal court enjoined local elections pending submission of the uncleared changes. [39]

(*b*) *Lumberton, North Carolina.*—Robeson County, in which the City of Lumberton is located, is one of 41 counties in North Carolina covered by the pre-clearance provisions of Section 5. The county contains approximately 84,000 people and is 43% white, 26% black, and 31% Indian. Lumberton, by contrast, is 68% white, 24% black, and 8% Indian.

Between 1967 and 1970, the Lumberton City Board of Education annexed into its administrative unit three separate areas in Robeson County. Although these changes in the electorate of the Board were required to be pre-cleared, no submission was made until a written request from the Attorney General in 1974.

The Attorney General objected to the changes on June 2. 1975: "[e]xtensive contact with minority group members both black and Indians through Robeson County, indicates the existence of a racially discriminatory purpose behind the annexations . . . [in] clear violation of the Fifteenth Amendment. *Gomillion v. Lightfoot*, 364 U.S. 399 (1960)." [40] The purpose of the annexations, the Attorney General found, was "to assure that the children of suburban whites could continue to attend City of Lumberton schools, rather than attending the predominantly minority Robeson County schools. We have received substantial evidence that the boundaries of these annexations were outlined in a convoluted, meandering fashion with the result that blacks and Indians were virtually excluded from the three annexations in question." [41]

Notwithstanding the objection of the Attorney General, the school board continued to implement the three annexations and hold elections for the Board of Education under the discriminatory apportionment plan. On October 15, 1981 six years after the objection, and fourteen years after the annexations first began, a three-judge court ruled that the board was in violation of Section 5. [42] Inexplicably, the court allowed elections scheduled for November 3, 1981 to go forward with the proviso that if the objection was not removed by December 31, a special election must be held to fill all Board of Education seats. The plantiffs filed an application in the Supreme Court for an injunction pending appeal prohibiting *any* use of the annexations in future elections. On October 30, 1981, the Court granted the injunction.

7. Other Forms of Section 5 Non-Compliance

In enacting Section 5 Congress concluded there was no way of anticipating what new procedures in voting might be implemented by covered jurisdictions. Accordingly, it made no attempt to identify particular changes which might prove discriminatory and require pre-clearance only of them. Instead, it required pre-clearance of *all* changes in voting. Congressional wisdom has been fully vindicated.

(*a*) *DeKalb County, Georgia.*—In January, 1980, the DeKalb County, Georgia, Board of Registration adopted a policy that it would no longer approve community groups' requests to conduct voter registration drives. DeKalb County is in the five-county metropolitan Atlanta area. At that time, only 24% of black eligible voters were registered, as opposed to 81% of whites. The county refused to submit its change in registration policy for pre-clearance, arguing that it was not a change in voting. After a contested lawsuit, the county was required to submit the change. [43] On September 11, 1980, the Attorney General noted an objection because he was "unable to conclude . . . that disallowing neighborhood voter registration drives does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." [44]

(*b*) *Sumter County, Alabama.*—In Sumter County, Alabama, persons seeking nomination by political primary filed their qualification papers with the chairperson, who was always white, of the county Democratic Party. In 1974, a black was chosen as county chairperson. The next year, white candidates chose to bypass the chairperson and file with the judge of probate. They contended that this change was not covered by Section 5 and made no submission. Blacks sued to require pre-clearance. Following a decision by the court of appeals that Section 5 was applicable, the new qualification procedure was abandoned. [45]

(*c*) *Political Parties; Alabama.*—The Democratic and Republican parties of Alabama implemented new rules for the conduct of the May 2, 1972, elections of delegates to their national conventions. The rules involved the construction of geographical voting districts from which candidates ran for convention seats.

Since the boundaries of districts can be gerrymandered along racial lines, black residents of the state requested both parties to submit the new rules for pre-clearance under Section 5 to insure that they did not have the purpose or effect of discriminating on the basis of race. The parties refused, contending that they were political parties, not state or political subdivisions, and thus were not covered by Section 5.

On May 13, 1973, the court of appeals granted the relief sought: "if a state could escape the requisites of Section 5 by channeling to political parties its authority to regulate primary elections, the force of the Voting Rights Act in the context of primaries would be entirely abrogated." [46] The changes were required to be pre-cleared.

The Democratic Party thereafter filed suit in the District of Columbia seeking pre-clearance of the new rules, the first Section 5 lawsuit ever filed by a covered jurisdiction in the District of Columbia. [47] The Attorney General, who is required to defend suits brought against the United States under the Voting Rights Act, did not oppose the Democratic Party's motion for judgment on the pleadings.

(*d*) *Americus, Georgia.*—Prior to 1965, voting in Americus, Georgia, was segregated by race. After the practice was enjoined by a federal court, the city adopted sex segregated voting but did not pre-clear the change. The city marshal defended the practice on the ground that segregation by sex made voting more efficient. Local blacks believed the practice was designed to spare white women the "indignity" of standing in line with black males, and asked the Department of Justice to require that the new procedure be pre-cleared. The Attorney General informed city officials in December, 1979, that the change could not be implemented absent pre-clearance. The city elected to desegregate its voting rather than submit the change under Section 5.

(*e*) *Moultrie, Georgia.*—In Moultrie, Georgia, the all-white Lions Club traditionally contracted with the city to run municipal elections. Blacks complained about the practice until the city agreed to advertise in the local paper in 1979 for new poll workers to help the Lions. Several people answered the ad, whereupon the city election manager, after consulting with the city attorney, instituted a literacy test for new, but not old, poll workers. Although this was a change in election procedures, no effort was made to comply with Section 5. The literacy test was abandoned after complaints from local blacks, who were plaintiffs in the lawsuit which successfully enjoined further use of an uncleared majority vote requirement for city elections. [48]

(*f*) *Tifton, Georgia.*—Rules requiring candidates to live in specified districts are generally thought to disadvantage minorities because they limit the opportunities for single shot voting by separating elections into individual races. In some instances, however, *e.g.*, where a residency district is substantially black, a residency requirement may in practice limit the number of whites seeking office and enhance the chances of election of minority candidates.

In 1968, the four commissioners of Tifton, Georgia, were elected at-large but required to qualify from residential districts. That year, the General Assembly abolished the residency requirement. Though this change was required to be precleared, no attempt was made to comply with Section 5.

In 1977, two candidates, one white and the other black, qualified for one of the commission seats. The white candidate lived outside the district which had formerly been used for electing that commission position. Prior to the election the black candidate filed suit to enjoin the uncleared repeal of the residency requirement. [49] The district court did not act upon the complaint until after the election. It enjoined future use of the 1968 change, but nevertheless refused to set aside the 1977 election results.

The ruling of the district court was appealed to the Supreme Court. During the pendency of the appeal, Tifton officials submitted the 1968 enactment to the Attorney General who pre-cleared the change. In light of the ruling of the Attorney General, the appeal to the Supreme Court was withdrawn.

(*g*) *Camden County, Georgia.*—In 1978, Camden County, Georgia officials designated an all-white women's club in the City of Kingsland as the new municipal polling place. Although the change was not pre-cleared, the county made preparations to use the club at the August 8, 1978, primary election.

ACLU attorneys, on behalf of local blacks in Camden, informed the county attorney that the change was unenforceable absent pre-clearance, that the use of a racially exclusive club for elections was "inappropriate," and requested that a more suitable polling place be designated.

The county elected to submit the change to the Department of Justice, but preclearance was denied shortly before the August election.

8. Refusal to Comply with Section 5 Objections

While many jurisdictions have failed to submit changes for pre-clearance, a surprising number have refused to comply with objections interposed by the Attorney General after submission has been made. The law is unambiguous that decisions by the Attorney General under Section 5 are final and are not appealable. [50] The only method by which a jurisdiction may seek review of an objection is by filing a declaratory judgment action in the federal courts of the District of Columbia. Nonetheless, many jurisdictions, such as the Lumberton, North Carolina, City Board of Education, (see page 53), have simply refused to obey the law.

(*a*) *Sumter County, Georgia.*—The Board of Education of Sumter, Georgia, adopted at-large voting when its single-member districts were found in 1972 to be malapportioned. At that time, three of the five districts used were majority black. The Board made a Section 5 submission of the change and the Attorney General objected for the reason that at-large voting "would result in the dilution and minimization of the voting strength of black citizens." [51]

The Board, however, notified the Department of Justice that it considered its at-large plan to be court-ordered and exempt from Section 5. In the Board's opinion, the objection was "illegal, void and of no effect." [52] The Attorney General notified the Board that its at-large elections were not enforceable, but the Board has held elections at-large ever since. No blacks have been elected to office.

Local blacks filed a lawsuit in 1980 to enforce the Attorney General's objection. A three-judge court was convened to hear the complaint, and on December 1, 1981, ruled that the Board's 1973 plan was legislative and required to be pre-cleared. The county was directed to develop a new plan "subject to the pre-clearance requirements of Section 5." [53]

(*b*) *Pike County, Georgia.*—In 1970, the Pike County, Georgia, Board of Education was elected by districts. After two blacks ran for office, and before the next elections, a statute was enacted providing for elections at-large. No preclearance was sought. In March, 1979, at the insistence of the Attorney General, the change was submitted and found objectionable. But the county refused to honor the objection—until a lawsuit was filed in February, 1980 to enforce Section 5. [54]

(*c*) *Waynesboro, Georgia.*—Waynesboro, Georgia adopted a majority vote requirement in 1971. A submission was made to the Attorney General who objected for the reason that he could not conclude "that the provision . . . does not have the purpose or effect of abridging the right to vote on account of race." [55] The city ignored the objection until it was sued in 1976, whereupon it finally agreed to return to the use of plurality vote. [56]

(*d*) *Edgefield, South Carolina.*—In 1976, Edgefield County was required under a state law, known as the Home Rule Act, to re-establish its county government. It did so and adopted at-large voting and retained a five-member council. This enactment was submitted to the Department of Justice, which objected to the use of at-large elections, noting that if a new election system was adopted, "that more accurately reflects minority voting strength, such as single member districts," the objection would be reconsidered. [57] A single member plan was in fact prepared and approved by the council, but was never submitted under Section 5 because the council subsequently took the position that the Attorney General's objection was not binding. A lawsuit to enforce Section 5 is presently pending. [58]

9. *Evasion of Section 5*

Many jurisdictions, as the list of submissions to the Attorney General attests, have complied with Section 5. But some of those have resorted to various stratagems to circumvent or undercut objections that have been imposed. Still others have attempted to evade Section 5 altogether by claiming exemptions from preclearance.

(*a*) *Thomson, Georgia.*—The use of "cuing" in Thomson, Georgia, i.e., the endorsement by white community leaders of a particular candidate prior to the actual election, is a striking example of doing by indirection that which Section 5 expressly forbids. On September 3, 1974, the Attorney General objected to several voting changes submitted by the City, including a majority vote requirement for election of the mayor: "Our analysis shows that where, as in Thomson, there is increasing participation in the political process by the black community, the use of numbered posts, staggered terms and majority requirements have the potential for reducing the opportunity for minority voters to elect candidates of their choice. . . . Under such circumstances, the Attorney General cannot certify that no such effect will ensue." [59]

Before the next elections in 1974, the incumbent mayor announced that he would not seek re-election. E. Wilson Hawes, a white man, was the first to offer for the vacant post. Luther Wilson, Jr., a black assistant school principal, offered next. Subsequently, William M. Wheeler, a white McDuffie County attorney, filed for the vacant mayoral position.

Local whites soon approached the two white candidates and urged one of them to get out of the race to insure that Wilson could not get elected by plurality. Each candidate, they suggested, should nominate twelve persons to take a vote and "decide which white man was to run." [60] Had the majority vote requirement not been blocked, there would have been no need for one of the white candidates to withdraw. Whites could have simply regrouped in the run-off, even if the black was the top vote getter.

A mini-election was held at City Hall on October 21, 1974 and Wheeler was the winner. Following the meeting, Hawes announced that pursuant to the "gentlemen's agreement" he was bowing out of the race. However, he had an apparent change of heart, whereupon, Wheeler got out of the race, leaving Hawes as the white community's candidate to oppose Wilson. Wheeler publicly announced, "I am not now a candidate. . . . Somebody had to honor the gentlemen's agreement of Tuesday night, and since Hawes didn't, I will." [61]

The general election was held on October 30, and Hawes soundly defeated Wilson.

(*b*) *Dorchester County, South Carolina.*—Dorchester County, South Carolina, was sued in 1973 by local blacks because the two districts used for election of the county council were malapportioned on the basis of population. [62] After the district court declared the plan invalid, the county, rather than redrawing its district lines, adopted at-large voting. Following a Section 5 submission, the Justice Department objected to the plan, because "even though blacks constitute over 35 percent of the population (1970 census) in Dorchester County, no black has ever been elected to the county council in modern times and there is a history of racial bloc voting." [63]

In response to the objection, the county council developed another plan retaining the two pre-existing districts but shifting precinct lines to reduce population variance. Blacks were in a minority of registered voters in both the proposed new districts.

Subsequently, the defendants concluded that under state law, Dorchester County lacked the power by legislative means to reapportion itself. Under the circumstances, the only method of curing faulty election procedure was through a court-ordered plan. Since courts are required to utilize single-member districts in reapportionment absent compelling circumstances, the defendants prepared for the court a plan utilizing seven single-member districts. Two of the council districts are majority black.

(c) Moultrie, Georgia.—In May, 1977, a three-judge court enjoined use of a majority vote requirement for election of the Moultrie, Georgia, City Council because of failure to comply with Section 5. [64] At the elections held later that month, a black won a plurality and was elected to office.

At the elections held the next year, three of the five council posts were scheduled to be filled, and the incumbents qualified for each of the posts, Two, Four and Five. Two black candidates entered the race for Posts Two and Four. A white man, Roscoe Cook, qualified for Post Five, and later, shortly before the candidate deadline, a black, Cornelius Ponder, Jr., also qualified for Post Five, leaving that seat to be contested by two whites and one black. Cook subsequently withdrew, leaving black candidates for each post opposed by a single white. This configuration ensured that no black would become elected by receiving less than a majority of votes, as had happened following the invalidation of the majority vote requirement by the three-judge court.

As might be expected, all the black candidates in the 1978 elections were defeated, and by approximately the same number of votes. John Green received 717 (28%), JoAnn Wilson received 652 (26%), and Cornelius Ponder, Jr., 716 (28%) of the votes cast. At the time of the election, blacks were approximately 24 percent of the registered voters in Moultrie.

(d) Kleburg County, Texas.—Mexican-Americans, who comprise 47% of the population of Kleburg County, Texas, were successful in getting the apportionment of the governing body (Commissioners' Court) declared unconstitutional on October 2, 1979. The district court ordered the defendants to submit a new plan in six weeks with a hearing to be held four weeks thereafter. Since under state law single-member districts were required, there was no issue of at-large versus single-member districts. The defendants claimed the plan was exempt from Section 5 because it was ordered by the court.

Plaintiffs objected to defendants' plan because it was not submitted for pre-clearance, and alleged that it diluted minority voting strength. The district court approved the plan, finding that it was court ordered and thus not subject to Section 5.

The court of appeals summarily reversed. [65] It held the plan should have been submitted for pre-clearance because a legislative plan does not become a court-ordered plan merely because it is the product of litigation.

The Supreme Court agreed to hear the case. The ACLU filed a brief *amicus curiae* in the Supreme Court arguing that pre-clearance was required.

County officials argued that the plan was court-ordered and therefore not subject to pre-clearance because: (a) it was a response to a court order, (b) it was prepared by an expert (not hired by them) and thus did not encompass their legislative judgment, (c) it was not adopted prior to submission to the court, (d) the district court considered it court-ordered, (3) it was put into effect only when defendants were ordered to do so, and (f) they did not possess the authority under state law to adopt the plan. Defendants also argued that pre-clearance would slow down the reapportionment process and that obstructionist officials could prevent any relief by refusing or failing to draft a plan adequate to receive pre-clearance.

The Supreme Court rejected all of these arguments finding that the Federal interest in protecting minority voting rights is the same whether the change in question is to remedy a constitutional violation or is merely a regular political decision, and that centralized review enhances consistent and expeditious decisions. The Court ruled that Congressional policy would be furthered by applying Section 5 and that the interests protected by the statute were not dependent upon the legal authority under state law possessed by defendants.

> [T]he essential characteristic of a legislative plan is the exercise of legislative judgment. . . . As we construe the congressional mandate, it requires that whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—the pre-clearance requirements of the Voting Rights Act is applicable to them. [66]

NOTES

1. *Perkins v. Matthews*, 400 U.S. 379, 396 (1971).

2. 42 U.S.C. Section 1973c; *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

3. *Perkins v. Matthews*, supra, at 383–84. The lower courts do, however, have some discretion in determining the appropriate remedy for Section 5 violations, including whether terms of office should be shortened or special elections held. *Ibid.*, 400 U.S. at 396–97.

4. 42 U.S.C. Sections 1973r and 1973j.

5. L. McDonald, "The Bolden Decision Stonewalls Black Aspirations," *Southern Changes*, July/August, 1981, 16.

6. *Allen v. State Board of Elections, supra*. at 544, 569.

7. *See e.g.*, C. Davidson and G. Korbel, "At-Large Elections and Minority-Group Representation: A Re-examination of Historical and Contemporary Evidence," *Journal of Politics* (Nov. 1981). R. Engstrom and M. McDonald, "The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship, *American Political Science Review* (June 1981); D. Taebel, "Minority Representation on City Councils," 59 *Social Science Quarterly* 143–52 (June 1978); T. Robinson and T. Dye, "Reformism and Black Representation on City Councils," 59 *Social Science Quarterly* 133–41 (June 1987); A. Karnig, "Black Representation on City Councils," 12 *Urban Affairs Quarterly* 223–43 (Dec. 1976); C. Jones, "The Impact of Local Election Systems on Black Political Representation," 11 *Urban Affairs Quarterly* 345–56 (March 1976). The second most frequent objection under Section 5 has been to changes from district to at-large voting.

8. *Jones v. Cowart*, Civ. No. 79–79 (M.D.Ga.).

9. *Davenport v. Isler*, Civ. No. 80–42 (M.D.Ga.).

10. *McKenzie v. Giles*, Civ. No. 79–43 (M.D.Ga.).

11. *Brown v. Scarborough*, Civ. No. 80–27 (M.D.Ga.).

12. *Thompson v. Mock*, Civ. No. 80–13 (M.D.Ga.).

13. *Butler v. Underwood*, Civ. No. 76–53 (M.D.Ga.).

14. *Williams v. Timmons*, Civ. No. 80–26 (M.D.Ga.).

15. *Corder v. Kirksey*, 639 F.2d 1191 (5th Cir. 1981).

16. *White v. Regester*, 412 U.S. 755, 766 (1973).

17. *Cross v. Baxter*, 604 F.2d 875 (5th Cir. 1979), on appeal after remand, 639 F.2d 1383 (5th Cir. 1981).

18. Letter from James P. Turner, Acting Assistant Attorney General to Hoyt H. Whelchel, Jr., June 26, 1977.

19. *Wilkerson v. Ferguson*, Civ. No. 77–30–AMER (M.D.Ga.).

20. *Brown v. Brown*, Civ. No. 81–198–MAC (M.D.Ga).

21. *Foreman v. Douglas*, Civ. No. CV281–143 (S.D.Ga.).

22. *Holloway v. Faust*, Civ. No. 86–28 (M.D.Ga.).

23. *McCain v. Lybrand*, Civ. No. 74–281 (D.S.C.).

24. *Brown v. Reames*, Civ. No. 75–80–COL (M.D.Ga.). Trial Record, 217.

25. *Ibid.*, 250, 264–65, 267.

26. *McKenzie v. Giles, supra.*

27. *Thompson v. Mock, supra.*

28. *Hughley v. Adams*, Civ. No. C80–20N (N.D.Ga.). on appeal, No. 81–7068 (5th Cir.)

29. *Cochran v. Autry*, Civ. No. 79–59 (M.D.Ga.).

30. *Graves v. Barnes*, 343 F.Supp, 704, 725 (W.D.Tex. 1972), aff'd, *White v. Regester, supra.*

31. *Holloway v. Raines*, Civ. No. 77–27 (M.D.Ga.).

32. *Haywood v. Edenfield*, Civ. No. CV 281–142 (S.D.Ga.).

33. *Foreman v. Douglas, supra.*

34. *Berry v. Doles*, Civ. No. 76–139 (M.D.Ga.).

35. *Haywood v. Edenfield, supra.*

36. *Perkins* v. *Matthews*, supra, at 388.

37. *City of Richmond* v. *United States*, 422 U.S. 358, 370 (1975).

38. *Ibid.*

39. *Brown* v. *Brown*, supra.

40. Letter from J. Stanley Pottinger to Luther J. Britt, Jr. June 2, 1975.

41. *Ibid.*

42. *Canady* v. *Lumberton City Board of Education*, Civ. No. 80–215–CIV3 (E.D.N.C.), *grant. injun. pend. appeal*, —— U.S. ——, 102 S. Ct. 494, 1981).

43. *DeKalb County League of Women Voters, Inc.* v. *DeKalb County, Georgia, Board of Registrations and Elections*, 494 F.Supp. 668 (N.D.Ga. 1980) (three-judge court).

44. Letter from Drew Days, Assistant Attorney General, to Harry E. Schmidt, September 11, 1980.

45. *Sumter County Democratic Executive Committee* v. *Dearman*, 514 F.2d 1168 (5th Cir. 1975).
46. *MacGuire* v. *Amos*, 343 F.Supp. 119, 121 (M.D.Ala. 1972).
47. *Vance* v. *United States*, No. 1529–72 (D.D.C.).
48. *Cross* v. *Baxter, supra.*
49. *Washington* v. *Brown*, Civ. No. 77–35 (M.D.Ga.).
50. *Morris* v. *Gressette*, 432 U.S. 491, 507 (1977) ; *Briscoe* v. *Bell*, 432 U.S. 404 (1977).
51. Letter from J. Stanley Pottinger, Assistant Attorney General, to Henry L. Crisp, July 13, 1973.
52. Letter from Henry L. Crisp to J. Stanley Pottinger, July 24, 1973.
53. *Edge* v. *Sumter County School District*, Civ. No. 80–20–AMER (M.D.Ga. December 1, 1981).
54. *Hughley* v. *Adams, Supra.*
55. Letter from David L. Norman, Assistant Attorney General to Jerry Daniel, City Attorney, January 7, 1972.
56. *Sullivan* v. *DeLoach*, Civ. No. 76–238 (S.D.Ga.).
57. Letter from Drew Days, Assistant Attorney General, to H. O. Carter, February 8, 1979.
58. *McCain* v. *Lybrand, supra.*
59. Letter from J. Stanley Pottinger, Assistant Attorney General, to Jack D. Evans, City Attorney, September 3, 1974.
60. "Thomson's Mayoral Race Up in Air," *Atlanta Constitution*, October 26, 1975.
61. *Ibid.*
62. *DeLee* v. *Branton*, Civ. No. 73–902 (D.S.C.).
63. Letter from J. Stanley Pottinger, Assistant Attorney General, to Treva Ashworth, April 22, 1974.
64. *Cross* v. *Baxter, supra.*
65. *Sanchez* v. *McDaniel*, 615 F.2d 1023 (5th Cir. 1980).
66. *McDaniel* v. *Sanchez*, —— U.S. ——, 101 S.Ct. 2224, 2237–38 (1981).

CONTINUING BARRIERS TO EQUAL POLITICAL PARTICIPATION

II. USE OF DISCRIMINATORY VOTING PRACTICES ADOPTED PRIOR TO THE VOTING RIGHTS ACT

Despite widespread non-compliance with Section 5, pre-clearance has been effective in blocking hundreds of discriminatory voting changes, and undoubtedly, Section 5 has acted as a deterrent to enactment of many others. Section 5 does, however, have two significant limitations. It does not affect voting practices adopted prior to November 1, 1964, even though they may be clearly discriminatory in purpose and effect. Secondly, Section 5 does not affect changes in voting which increase—but only partially—minority participation in the elective process.

In *Beer* v. *United States*, [1] the Supreme Court was asked to review a decision of the federal court in the District of Columbia denying clearance to a reapportionment plan for the City of New Orleans. The lower court had ruled that, although the new plan created two single-member districts with a majority of black voters where before there had been none, the plan was objectionable because it failed to eliminate pre-Voting Rights Act at-large seats for the city council which restricted the opportunities of minorities for election. The Supreme Court reversed the ruling, concluding that an "ameliorative new legislative apportionment cannot violate Section 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." [2] In other words, a change in election procedures which removes some, but not all, barriers to voting ordinarily will not violate Section 5.

Unfortunately, most of the discriminatory voting practices in use today are not those which have been implemented without pre-clearance, but those which pre-date the Voting Rights Act, or have been only partially ameliorated, and are thus entirely beyond the reach of Section 5. The only way to challenge these practices is through traditional lawsuits in the local jurisdictions. Litigation has been effective in many instances, but it has also proven to be burdensome and time consuming, and results have often been inconsistent and erratic.

1. *The Burdens of Constitutional Litigation.*

Almost all of the lawsuits brought to protect voting rights have been decided by the courts under the Fourteenth and Fifteenth Amendments of the Constitution. In constitutional challenges, unlike those under Section 5, in which the jurisdiction seeking to implement a change has the burden of showing no discriminatory purpose or effect, those attacking a particular election procedure have the burden of proving a violation of the law. And, the burden is not an easy one.

In *White* v. *Regester*, [3] decided in 1973, the Supreme Court said that in determining whether a constitutional violation of voting rights had occurred:

The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Applying this standard, the Court affirmed the unconstitutionality of at-large elections in Bexar and Dallas Counties, Texas, upon proof by the plaintiffs of a long history of official discrimination, indifference to minority needs and restricted access of minorities to the political process. [4] In Dallas County, this last factor arose because blacks were not supported by a private citizens group, and were thus unable to win countywide elections. In Bexar County, the evidence was simply the cultural barriers that impeded Hispanics; participation in the political process.

One of the most important circuit court opinions which followed *White* v. *Regester* was *Zimmer* v. *McKeithen*. [5] In *Zimmer*, the court said that lack of equal political participation, or unconstitutional dilution of minority voting strength, could be shown by proof of such things as: a history of official racial discrimination, particularly in registering and voting; a disproportionately low number of minority group members elected to office; a lack of responsiveness on the part of elected officials to the needs of the minority community; depressed socio-economic status of minorities; majority vote requirements; tenuous policy favoring at-large voting; lack of access to candidate slating; large district size; lack of residential requirements for candidates; anti-single shot voting laws.

Later decisions at the appellate level held that discriminatory purpose was necessary for a constitutional violation, but that proof of an "aggregate" of the factors in *Zimmer*, or factors similar to them, was enough to show invidious purpose. [6]

Proof of the *Zimmer* factors requires an enormous expenditure of time and money. Since the significance of race in literally every aspect of the public and private life of the jurisdiction is relevant, hundreds of lawyer hours are required to make a record of historical and continuing discrimination in voting, public accommodations, appointments to boards and commissions, provision of services, police practices, employment, education, jury selection, political associations, etc. Historians, sociologists, statisticians, engineers, political geographers, media analysts and demographers, among others, all need to be consulted and used as expert witnesses in gathering and analyzing the relevant evidence in constitutional lawsuits. Not surprisingly, voting cases are given a weight of 2.8420 by a 1980 survey of federal district judges. [7] An average case is weighted 1.000 on a scale that measures the complexity and amount of judicial resources different categories of cases need. Voting cases are exceeded in complexity by only ten of the fifty-five categories listed in the survey.

The Supreme Court has observed that "voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial." [8] By comparison to a constitutional challenge in an at-large case, a 6,000 hour registration case may be trivial since the very same registration evidence is often a part, but only a small part, of trying to prove that at-large elections dilute minority voting strength.

Aside from the time and expense involved in proving the factual elements of dilution at trial, use of the legal standards in *Zimmer* has led to unnecessarily protracted and erratic decision-making. The *Zimmer* formula contains objective elements, such as a lower number of black elected officials and depressed levels of voter registration. It also contains elements that require the trial judge to make essentially subjective judgments, *e.g.*, whether or not local officials have been unresponsive, which are difficult, if not impossible, adequately to review on appeal. For this reason, in part, cases are often shunted from trial to appellate court for continual revision and fine tuning. As a consequence, decision-making in voting lawsuits has often been impressionistic, and fairly open to the charge of being unreliable.

(*a*) *Pickens County, Alabama.*—Blacks in Pickens County, Alabama, after the decision in *White* v. *Regester*, filed suit in 1973 alleging that at-large general elections for the county commission diluted their voting strength. The case was tried in the district court, appealed to the court of appeals, sent back for more fact finding to the trial court, appealed again to the court of appeals, sent back again to the trial court for more fact finding, and appealed a third time to the court of appeals. On March 16, 1981, 8 years after the complaint first was filed, the court held that at-large elections for the Commission were constitutional.

(*b*) *Fairfield, Alabama.*—Black residents of the City of Fairfield, Alabama fared no better. They also filed a dilution lawsuit in 1973 against the City Council. The district court ruled 2 years later that local procedures were unconstitutional. The court's findings included:

(1) A "very very high" level of racial blocvoting;

(2) "Disparities in employment of blacks within the City of Fairfield";

(3) "Lack of responsiveness to the needs of the black community";

(4) A history of discrimination;

(5) Traditional exclusion of blacks from office-holding and "the decision-making process of the city";

(6) A tenuous state policy in favor of at-large districts. [9]

The City appealed, and the court of appeals reversed. It did not question the facts, but said the consideration of the *Zimmer* criteria was inadequate. It sent the case back for further hearing.

The trial judge, without taking any additional evidence, reconsidered his findings and reached the countrary conclusion that there was no dilution of the black vote. The decision was affirmed on appeal in 1980, seven years after the complaint was filed.

Voting rights litigation, because it seeks to alter the balance of political power, is never popular with local officials. Not surprisingly, voting rights plaintiffs, and their lawyers, are frequently the victims of retaliation.

(*c*) *McDuffie County, Georgia.*—Public officials in McDuffie County counterclaimed against the plaintiffs in a voter dilution case for $93,500.00 in alleged actual and punitive damages on the grounds that the complaint was "a malicious abuse of civil process" and plaintiffs had sued them in bad faith. [10] The court eventually entered a consent judgment for the plaintiffs and the counterclaims were dismissed.

(*d*) *Choctaw County, Alabama.*—The plaintiffs in a Choctaw County, Alabama voting case decided to dismiss their dilution complaint against the school board voluntarily without prejudice. The trial court, however, refused to allow them to do so, and dismissed the case with prejudice. The court also awarded $2,500 in attorneys' fees to the defendants, payable by the plaintiffs. The court of appeals reversed. It said the plaintiffs had an absolute right to dismiss their complaint and the award of attorneys' fees was "a nullity." [11]

(*e*) *Lumberton, North Carolina.*—The members of the Lumberton, North Carolina, City Board of Education, when sued in a Section 5 enforcement case, not only asked the court to assess the plaintiffs with costs and attorneys' fees for alleged failures to comply with discovery, but accused their lawyers of solicitation and "coercing" the plaintiffs into filing suit. Solicitation is an unethical practice that can result in disbarment. [12] The court ruled for the plaintiffs on the merits and found the request for fees moot. It never addressed the charge of solicitation.

Because of the costs, delays, and often inconsistent results in litigation, relatively few voting cases are filed. The total number of all voting rights cases filed nationwide, including those filed by the Department of Justice, in each of the past five years is as follows:

1980	160
1979	145
1978	139
1977	203
1976	[13] 176

2. The Repeal of the Zimmer Standard

The burdens of constitutional litigation under the *White-Zimmer* standard were heavy enough. In 1980, in *City of Mobile* v. *Bolden*, [14] the Supreme Court made them even worse.

Blacks in Mobile, Alabama brought suit in federal court in 1975 charging that the election of the city commission at-large diluted their voting strength. The district court agreed and ordered the city to establish a mayor and council form of government elected from districts. The Court of Appeals affirmed based upon proof by the plaintiffs of an aggregate of the *Zimmer* factors. The Supreme Court reversed.

A plurality of the Court held that the Fifteenth Amendment does not protect against mere vote dilution, but only the right physically to register and vote without hindrance. As for the contention that Mobile's at-large scheme violated the Fourteenth Amendment, the plurality ruled that plaintiffs' burden was to show that it was conceived or operated as a purposeful device to further racial discrimination, and that the *Zimmer* factors "were most assuredly insufficient to prove an unconstitutionally discriminatory purpose." [15]

Purpose could be shown by proof that a voting system was adopted or maintained "in part 'because of,' not merely 'in spite of,'" its adverse racial effects. [16] The case was sent back for further hearings on whether Mobile's electoral system had been retained for a racially discriminatory purpose.

There were six separate opinions in *City of Mobile*, and no majority. As a consequence, the decision is often confusing and difficult to follow. Justice White, who wrote the unanimous decision in *White* v. *Regester*, said in a dissenting opinion that *City of Mobile* was "flatly inconsistent with *White* v. *Regester*," and left the lower courts "adrift on uncharted seas." [17] And indeed it has.

The Court of Appeals for the Fifth Circuit, which has had the bulk of voting rights litigation, is hopelessly confused about what *City of Mobile* means. One panel recently held in three cases from Florida that after *City of Mobile*, the central inquiry of the trial court should be whether there is purposeful discrimination in the adoption or use of a voting procedure, and that most of the *Zimmer* factors are irrelevant, *e.g.*, "whether current office holders are responsive to black needs and campaign for black support is simply irrelevant . . . a slave with a benevolent master is nonetheless a slave." [18]

A month later, a different panel of the Fifth Circuit held in three virtually identical cases from Georgia that the *Zimmer* factors were still relevant "to the extent that they allow the trial court to draw an inference of intent," [19] and that unresponsiveness was the *sine qua non* of vote dilution—that without a finding of unresponsiveness, there could be no abridgement of minority voting strength.

> [A] plaintiff must establish that the governmental body in question is unresponsive to its legitimate needs. Reduced to its simplest terms, failure to prove unresponsiveness precludes a plaintiff from obtaining relief. [20]

The Supreme Court agreed on October 5, 1981 to hear one of the three cases from Georgia, *Lodge* v. *Buxton*, and may clarify the meaning of *City of Mobile*. If the court rules that even the limited use of *Zimmer* in *Lodge* to create an inference of discriminatory intent was misplaced, it will be impossible to win a constitutional challenge except where local officials publicly confess to a racial motive. No one can expect that to happen very often.

Regardless of what the Supreme Court may do in *Lodge*, *City of Mobile*, with its artificial burden of proof standard, has deterred the filing of new constitutional litigation. It has also had immediate and adverse impact upon pending cases at the trial and appellate levels.

3. Section 2 of the Voting Rights Act of 1965

Congress was well aware of the delays and uncertainties in contesting possibly discriminatory voting changes in traditional litigation, and for that reason enacted Section 5 of the Voting Rights Act. Congress was equally aware that the same delays and uncertainties could occur in challenging voting procedures enacted before the effective date of pre-clearance, and for similar reasons enacted Section 2 of the Act, which contains a substantive standard similar to that in section 5.

Section 2 prohibits voting practices which "deny or abridge" the right to vote. Nicholas Katzenbach, then Attorney General, testified before Congress in 1965 that Section 2 was intended to ban "any kind of practice . . . if its purpose *or* effect was to deny or abridge the right to vote on account of race or color." [21] This interpretation of Section 2 was reiterated last year in an *amicus* brief filed by the Department of Justice in *Lodge v. Buxton*. According to the Attorney General, blacks are entitled to relief under Section 2 "if they . . . can establish that the challenged practices, though neutral in design, have the effect of abridging the right to vote on account of race." [22]

Given this interpretation, racial minorities could successfully challenge voting procedures under Section 2 which have adverse effect, even if they could not establish a constitutional violation because of lack of proof of racial purpose. Notwithstanding the altered standard of proof under Section 2, no vote dilution cases have been decided solely on the basis of the statute. [23] That has been so, undoubtedly, because, prior to *City of Mobile*, adverse effect in the context of past and residual discrimination was sufficient to make out a constitutional violation. Section 2 was essentially redundant.

The Supreme Court has never authoritatively construed the scope of Section 2, although a plurality in *City of Mobile* said the statute has a reach no different from that of the Fifteenth Amendment and prohibits only intentional discrimination. The resolution of this issue by a majority of the Court will have obvious significance for future voting rights litigation.

4. At-Large Elections: Pre-City of Mobile

In spite of the burdens of constitutional litigation, atlarge election systems adopted before the effective data of Section 5 have been successfully challenged in a number of cities and counties.

(*a*) *Georgia Consent Decrees.*—Some jurisdictions, prior to the *City of Mobile*, consented to judgment. But in most instances, the plaintiffs were required fully to prepare their cases, and settlement was made only on the eve of trial.

In Georgia, consent decrees were entered establishing district election plans for the McDuffie County Board of Commissioners (1978), the McDuffie County Board of Education (1978), the Thomson City Council (1978) ; [24] the Coffee County Board of Education (1977), the Douglas City Council 1977) ; [25] the Peach County Board of Commissioners (1979) ; [26] the Terrell County Board of Commissioners (1979) ; [27] the Waynesboro City Council (1977) ; [28] the Sumter County Board of Commissioners (1980), the Americus City Council (1980) ; [29] the Dawson City Council (1979) ; [30] and the Madison City Council (1978). [31]

All of these jurisdictions have a common racial history of discrimination in voting, bloc voting by whites, few if any black elected officials, and election mechanisms such as majority vote requirements, numbered posts and staggered terms of office. Sumter County is typical.

Prior to the Voting Rights Act, only 548 blacks were registered to vote in Sumter County, 8.2% of the eligible population. Voting was segregated and blacks were excluded from positions as election managers and poll workers. The Jaycees, an all white organization, ran county elections. The Democratic Party was racially exclusive and no blacks served on its executive committee until 1975.

Beginning in the early 1960's, SNCC and other civil rights groups launched voter registration drives in Sumter County. Shortly thereafter, in 1963, four SNCC workers involved in those campaigns were arrested and charged with insurrection—at that time a capital offense in the State of Georgia. The four were held without bail until a three-judge court enjoined the prosecutions, ruled the insurrection statute unconstitutional, and ordered the defendants admitted to bail. The prosecutor, Stephen Pace, Jr., later admitted that "the basic reason for bringing these [insurrection] charges was to deny the defendants * * * bond * * * and convince them that this type of activity * * * is not the way to go about it." [32] Remaining charges against the four were eventually dismissed.

The courts also began to declare unconstitutional other forms of discrimination in the electorate. In 1965, a federal district court enjoined racial segregation in county elections, interfering with black voters, maintaining voter lists on a racial basis, and prosecuting blacks for their attempts to vote, and failing to release them on their own recognizance. [37]

Two years later, in *Bell v. Southwell*, the court of appeals set aside county elections because of "gross, spectacular, completely indefensible * * * state imposed, state enforced racial discrimination." [34] The practices cited were segregated voting lists, segregated voting booths, intimidation of black voters by election officials, and the "unwarranted arrest and detention" of blacks who protested the racial discrimination.

Resistance to increased black political participation evidenced itself in other ways. On September 7, 1965, the Board of Commissioners instructed the county attorney to investigate recently registered voters to determine if any had ever been convicted of a felony and could be purged under state law.

In June, 1978, the Sumter County Democratic Party abolished its primaries, but failed to comply with the pre-clearance provisions of Section 5 prior to the holding of general elections in December, 1978. Other Section 5 violations are the continuing refusal of the Sumter County Board of Education to honor an objection to at-large voting by the Attorney General, and the failure of the City of Americus to pre-clear a majority vote requirement for election of the mayor and council adopted in 1965.

On April 7, 1980, the defendants agreed to a judgment finding at-large elections for the county commission unconstitutional on the grounds that they diluted black voting strength. At the next election held in August, 1980, under a court-ordered plan utilizing single member districts, a black was elected to office, the first in Sumter County's modern history.

(*b*) *Lee County, South Carolina.*—Lee County, South Carolina, is 60 percent black, but prior to 1977, no black had ever been elected to a county office. Blacks were excluded from office by discriminatory registration procedures, and after passage of the Voting Rights Act, by the use of at-large elections.

On November 1, 1964, the seven member Lee County Commission was elected from single-member districts. In view of the fact that only 21 percent of eligible blacks were actually registered at that time, as opposed to 99 percent of eligible whites, none of the districts contained a black majority capable of electing a black to office.

The Voting Rights Act had substantial impact in Lee County. By July 31, 1967, 2,691 blacks (49 percent of the eligible population) were registered to vote, more than double the number since 1964.

The first black to run for the Board of Commissioners was Joseph Thomas in 1966. He lost his election, but because of the increased black voter registration in his district, his defeat was by only a few votes.

Prior to the next election, the district system was scrapped in favor of a five member council elected at-large without regard to residency. The Act was subsequently amended in 1971 to increase the membership of the council to seven and establish residency districts. At-large elections were retained.

The legislation was submitted to the Department of Justice and, surprisingly, was pre-cleared.

Blacks continued to run for the county council, but none were elected. On March 4, 1974, a lawsuit was filed in which the plaintiffs contended that at-large voting diluted their voting strength.

In support of their dilution claim, the plaintiffs showed that blacks in Lee County have a depressed socio-economic status, with lower levels of education than whites, higher rates of unemployment, lower incomes, and more substandard housing. Public schools were operated on a racially segregated basis until 1970. Blacks were excluded or under-represented on juries, in public employment and were discriminated against by local law enforcement officials.

No black served as a manager or clerk of any Lee County precinct until the general elections held on October 24, 1968, when 3 blacks served, 2 of the 3 in predominantly black precincts. From June 12, 1962, through July, 1974, of 1,118 persons who served as managers or clerks of precincts for general and primary elections, only 39 (3.5 percent) were black and those served only in precincts with substantial black population. The officers of the Lee County Democratic Party, chairpersons and secretaries, from 1966 through 1970 were without exception white.

From 1962 to 1975, of 10 persons appointed or reappointed to the Lee County Election Commission, only 2 were black, the first appointment of a black being on October 5, 1972. No black was ever appointed or served as a Supervisor of Registration or on the Industrial Planning Board, the Development Board, the Public Library Commission, the Historical Commission or the Tax Appeals Board.

Blacks seeking office in Lee County were given little or no assistance by local white officials, or were discouraged as an affirmative matter from running. Joseph Thomas, the black who ran for the Board of Commissioners in 1966, talked with Lee County's then state representative, later Circuit Court Judge Dan Laney, prior to elections to find out if there were any limitations on the Voting Rights Act of 1965 as far as Lee County was concerned, and to ask him to appoint poll workers on his behalf.

Judge Laney stated that he did not approve of the Voting Rights Act of 1965, would do nothing to see that illiterate voters received assistance in voting and that he could not appoint poll workers. He did not, however, suggest how Mr. Thomas might secure such appointments. Mr. Thomas next went to the Chairman of the Democratic Executive Committee and requested him to appoint poll workers on his behalf. The chairman told him that he did not have the authority to appoint poll workers, but did not tell him who in fact had such authority.

Voters in the Spring Hill precinct of Lee County were required to vote at an all white Masonic lodge.

Election returns showed a voting pattern along racial lines in Lee County. The pattern is easily discerned by looking at returns from precincts which are heavily white, *e.g.*, more than 80 percent white voter registration. Black candidates who showed great strength in black precincts always finished last, or nearly last, in the heavily white precincts.

On March 31, 1976, the district court ruled against the plaintiffs. While it adopted many of the plaintiffs' proposed findings, it concluded that "black citizens in Lee County participate on an equal basis with the white citizens" in the political process. [35] In support of its conclusion, the court noted that "favorable review" of the plan by the Attorney General in 1971 was entitled "to deference by the courts." [36] Plaintiffs appealed.

In the meantime, legislation was enacted by the General Assembly requiring all counties in South Carolina to elect one of five designated forms of government. The plaintiffs and other black citizens in Lee County secured enough signatures on a petition requiring the holding of a referendum whether the designated form of government should be elected by districts. The referendum was approved and on May 21, 1977, the General Assembly enacted a seven single member district plan for election of the county council. A majority of the districts are majority black.

The court of appeals, at plaintiffs request, dismissed the appeal as moot.

(*c*) *Henderson, North Carolina.*—On February 20, 1974, the NAACP filed a lawsuit on its own behalf and that of black voters and candidates, challenging the at-large election system, with residential candidacy districts, in the City of Henderson, North Carolina. [37] Blacks were 45 percent of the city's population, but no blacks had even been elected to city office. The district court granted summary judgment for the city.

The Fourth Circuit affirmed on June 3, 1976. The ACLU Foundation, Inc. filed a Motion for Leave to File a Memorandum Amicus Curiae, arguing that summary judgment was inappropriate in a case under the Fifteenth Amendment involving dilution of minority voting strength by an at-large system. Although the Court ordered the parties to respond to the motion, it ultimately let its decision stand, declining to order a rehearing *sua sponte*.

(*d*) *Prattville, Alabama.*—White residents of Prattville, Alabama, brought a private suit challenging the apportionment of the residency districts used in at-large elections for the Autauga County Commission and school board. [38] The city districts had far more population than the other districts, the effect of which was to insure rural dominance of both bodies. The Court held the plans under unconstitutional. [39]

At the remedy stage, a black resident, Sallie Hadnott, represented by ACLU attorneys, was granted permission to appear as *amicus curiae* to evaluate the plaintiffs' and defendants' proposed plans for racial or other bias, and to submit a plan of her own.

Amicus submitted to the court single-member district plans for both bodies. The court, however, adopted the defendants' plan, which used all single-member districts for the county commission, but incorporated two multi-member districts for the school board. While those apportionments did not maximize the opportunity for black participation in the electorate, their use of some, or all, district voting was a clear improvement over the prior at-large systems.

5. At-Large Elections: Post-City of Mobile

The *City of Mobile*, while not yet a total bar to constitutional challenges of discriminatory voting procedures, has had direct, and generally negative, impact on all pending litigation.

(*a*) *Burke County, Georgia.*—Burke County is the second largest of Georgia's 159 counties. Its population is in excess of 10,000 people, a slight majority of whom are black. However, no black has ever been elected to the five-member county commission.

Herman Lodge and other black residents of the county filed suit in 1976 alleging that at-large elections for the county commission weer unconstitutional. The district court found for the plaintiffs prior to the *City of Mobile* decision, and the court of appeals affirmed *after* the *City of Mobile* decision on the grounds that plaintiffs had proved intentional discrimination. The appellate court held that the county commissioners "have demonstrated such insensitivity to the legitimate rights of the county's black residents that it can only be explained as a conscious and willful effort on their part to maintain the invidious vestiges of discrimination. To find othewise would be to fly in the face of overwhelming and shocking evidence." [40]

The court of appeals also concluded that previous acts of official discrimination had a significant negative impact on the opportunity of blacks in Burke County to participate in the electorate. Prior to the Voting Rights Act of 1965, black suffrage was "virtually non-existent." [41] At the present, it is only approximately 38% of those eligible. [42] Evidence of past and present "block voting was clear and overwhelming." [43] Inadequate and unequal educational opportunities, both in the past and present, as the result of official discriminatory acts, precluded equal participation of blacks in politics.

Moreover, discrimination by the Democratic party in the county primary system deterred blacks from participation in the electorate. At the present only one of the 24 members of the Burke County Democratic Executive Committee is black. Upon the evidence, the court "concluded that the effect of historical discrimination was to restrict the opportunity of blacks to participate in the electoral process in the present." [44]

An additional factor showing discrimination in the use of at-large elections was the depressed socio-economic status of blacks: "Such depression has a direct negative impact on the opportunity for blacks to effectively participate in the electoral process." [45] Blacks were found to have a lack of access to the political operation of the local Democratic Party; the county commissioners' failure to appoint blacks to local governmental committees; and "the social reality that person-to-person relations, necessary to effective campaigning in a rural county, was virtually impossible on an inter-racial basis because of the deep-rooted discrimination by Whites against Blacks." [46] The court also found that other factors enhanced the dilution effect of the at-large voting, including the large size of the county, the presence of a majority vote requirement, the use of a numbered post system, and the absence of a residency requirement.

Upon all the evidence, the Court of Appeals concluded that the electoral system was maintained for invidious purposes. "The picture that plaintiffs paint is all too clear. The vestiges of racism encompass the totality of life in Burke County." [47]

The county appealed the decision, arguing that the lower court had erroneously applied the discredited *Zimmer* standards. The Supreme Court has noted probable jurisdiction.

(*b*) *Putnam County, Georgia.*—A lawsuit challenging at-large elections for the Putnam County, Georgia, Board of Commissioners, Board of Education and Eatonton Aldermanic Board was decided after the *City of Mobile* decision, and the district court ruled for the plaintiffs.

Putnam County is approximately 50% black, but had no black elected officials. Its county seat, Eatonton, the birthplace of Joel Chandler Harris, is also majority black, but had an all white government.

The trial court ruled in May, 1981 that at-large voting for all three local governments was being "maintained for the specific purpose of limiting the county's and the city's black residents' ability to meaningfully participate therein." [48] In making its finding, the district court observed:

If the city and county officials could point to a single period in this century when blacks have been able to meaningfully participate in the electoral process, the court would be receptive to the proposition that blacks just aren't interested in politics. The courts suggests that a careful review of discrimination in Putnam County indicates the contrary. Having concluded that blacks are interested in their standard of living, and that the present elected officials ineffectively represent them, the court must examine whether their vote is perceived to be meaningless. The past history of official segregation within Putnam County combind with both their inability to elect the members of their own race and with low voter registration and turnout compels but one conclusion—Putnam County blacks, through the actions of white elected officials past and present, have been denied equal access to the political process to such an extent that they will continue, in spite of their popular majority, to be defeated at the polls. [49]

The defendants have indicated they may appeal.

(*c*) *Edgefield County, South Carolina.*—Edgefield County has strong traditions of discrimination in voting and no black in this century has ever been a member of the county government, even though Edgefield is more than 50% black. The underlying cause for the inability of blacks to elect candidates of their choice to office is the use of at-large voting and severe racial polarization which exists as the heritage of past segregation.

Prior to enactment of the Voting Rights Act, only 650 blacks were registered in Edgefield County, 17% of the eligible population. By contrast, nearly 100% of eligible whites were registered.

In 1974, Tom McGain, an assistant professor of mathematics at Paine College in Augusta, became the first black since Reconstruction to run for Edgefield County government. McCain lost the 1974 race and a second race two years later because whites don't vote for blacks in Edgefield.

A visual examination of election results shows the severe racial polarization in local voting. In predominantly white districts where voting patterns are clearest, black candidates always get virtually the same number of votes—few or none at all. Bloc voting has been confirmed by Dr. John Suitch, a scientist at Aiken, who analyzed elections in Edgefield in which blacks have been candidates. The statistical correlation between the race of voter and candidate was "extraordinarily high" in the range of .9 (on a scale of —1 to +1) for each election. "The correlations are not just statistically significant," says Suitch, "they are overwhelming." [50]

McCain and other Edgefield blacks filed a federal lawsuit in 1974, alleging, among other things, that the at-large method of elections diluted their voting strength. On April 17, 1980, the court ruled that the at-large method of elections constitutionally infringed upon "the rights of the blacks to due process and equal protection of the laws in connection with their voting rights." [51] Further elections were enjoined until a new and constitutional method of electing the county council was adopted under state law. Some of the court's findings were:

"Until 1970, no black had ever served as a precinct election official, and since that year the number of blacks appointed to serve has been negligible."

"Blacks were historically excluded from jury service in Edgefield County."

"Blacks have been excluded from employment . . . it was only when trial was about to begin that the county suddenly began hiring blacks in any numbers . . . in addition, blacks are heavily concentrated at the lower wage levels."

"Blacks have been excluded by the county council in appointments to county boards and commissions."

"There is bloc voting by the whites on a scale that this court has never before observed . . . whites absolutely refuse to vote for a black." [52]

Four days after the district court's opinion, the Supreme Court decided *City of Mobile* v. *Bolden*. The Edgefield defendants moved the court to alter, amend or vacate the judgment on the basis of *City of Mobile* and the motion was granted. The plaintiffs were given leave to introduce additional evidence of whether "the at-large system was conceived or operated as a purposeful device to further racial discrimination." [53]

Determination of the dilution claim has been stayed pending resolution of certain Section 5 issues which are also present in the case.

(*d*) *Columbia, South Carolina.*—Columbia is the capital city of South Carolina and 35 percent of its population is black. Yet no black, within living memory, has even been elected mayor or to the four-member city council.

Columbia's at-large system of elections was adopted in 1910, at a time when blacks were excluded from the electorate. It would be a mistake, however, to assume that race did not play a critical role in the decision about what kind of government Columbia was to have.

The father of at-large voting in Columbia was John J. McMahan, one of Richland County's senators in the South Carolina legislature. For McMahan, who had also been a member of the delegation from Richland County to the South Carolina Disfranchising Convention of 1895, "good government" was directly tied to restricted suffrage, which meant utilizing at-large voting and continuing the exclusion of blacks from elections.

The McMahan bill for election of the city government in Columbia incorporated all the racially discriminatory provisions limiting the suffrage in general elections adopted by the Disfranchising Convention of 1895, and applied them for the first time to the primary. [54] No person could vote in the city primary unless he was a registered elector. In addition, would-be voters had to furnish receipts showing payment of all city, county and state taxes. Only then were special tickets issued allowing persons to vote.

Poll taxes were notorious as a device to thwart black registration, and some people criticized the McMahan bill for the reason that it "would deprive many citizens of their voting privileges."[55] But limitation of the franchise was one of the very things to be accomplished by the McMahan bill. *The State* newspaper, in fact, using the code words of the day, supported the bill precisely for the reason that "[t]he elections will be safeguarded." [56] The McMahan bill was adopted overwhelmingly in an all-white citywide referendum.

McMahan accomplished precisely what he set out to do in 1910—to perpetuate the exclusion of blacks from the electorate, consolidate local rule in the hands of a white, business and professional elite, and bring to an end broad based, participatory government for the City of Columbia. Blacks have run for office on many occasions since enactment of the Voting Rights Act of 1965, but because of at-large voting in Columbia none has ever been elected.

In 1977, black citizens of Columbia filed suit charging that the at-large method of elections diluted their voting strength. Part of their proof was evidence of Columbia's past and continuing racial history, with *de jure* and *de facto* discrimination extending to virtually all areas of life.

Blacks did not register and vote in significant numbers in Columbia until after abolition of the all-white primary in 1947, and enactment of the Voting Rights Act of 1965. In 1964, for example, blacks were only 13 percent of the registered voters in all of Richland County, of which Columbia is the county seat.

Schools were segregated from the first grade through college, and remained so long after the decision in *Brown v. Board of Education* (1954), [57] due to the deliberate strategy of "massive resistance" to desegregation by state and local officials.

Public accommodations, public housing, health care facilities, parks, public employment, public transportation and penal facilities were all rigidly segregated by law and by custom until passage of civil rights laws in the mid-1960's and federal judicial intervention.

So significant has race been that it was libelous *per se* in South Carolina as late as 1957 to publish in print that a white person is a Negro. During the same year, a bill was introduced into the South Carolina House of Representatives requiring any blood bank in the state to label all blood "so as to indicate white or colored." [58] The preceding year (two years after the *Brown* decision), the House and Senate passed a resolution removing from public labels as "inimical to the traditions of South Carolina" a book entitled *Swimming Hole*, which was about "the insignificance of skin color." [59]

Because of this past history of discrimination, blacks in Columbia exist at a lower socio-economic level than whites in housing, education, income, health care, and employment.

Residential areas in the city, public and private, are racially identifiable, and whites oppose the dispersal to their neighborhoods of integrated public housing.

Blacks have been excluded from many local boards and commissions to which the mayor and council make appointments. Blacks have also been discriminated against in employment by being excluded altogether from certain departments, and clustered in lower paying jobs.

The city presently maintains a membership for the Columbia City Manager in the all-white Summit Club, and on occasion has conducted business there. At one time, the city also maintained a membership for the city member in the racially exclusive Wildwood Country Club.

Because of the continuing effects of past discrimination, Columbia remains essentially two societies, one black and one white. Consequently, one of the critical problems faced by minority candidates is the lack of access to the dominant, numerically superior white community. As one black candidate, E. J. Cromartie, explained, during the trial of the lawsuit challenging at-large elections in Columbia:

In the white community, there's a tremendous problem of access. . . . You have civic organizations such as the Rotary, of course, and there are no blacks in the Civitan Club or the Summit Club. . . . The political process is simply an outgrowth . . . of how we live. [60]

In addition to the lack of access by black candidates, it is difficult in Columbia for others to campaign effectively for black candidates in the white community. The Fire Fighters Association got an adverse reaction in the 1978 mayor and council elections in white neighborhoods urging voters to support a biracial ticket. There was no comparable problem in black neighborhoods. And when a black who was successful in the primary election in 1972 ran in the general election, mailings weer made by the Democratic Party to black registered voters, but not to white for fear of "stirring up a bunch of persons to vote against" the black candidate. [61]

Cultural and social barriers erected by segregation continue significantly to impede black political opportunities and deny minority candidates white support. According to another black candidate for city council, Franchot Brown:

We cannot depend, as voting practices have proven in the past, on the white vote to elect a black candidate to city council. That's it, and I'm not being racist in what I'm saying, and I'm certainly not being anti-white or pro-black. I'm speaking from the facts as they have proven themselves in past campaign results. [62]

Douglas McKay, an expert in the field of electoral geography, conducted a study, based upon census data, of the relationship in Columbia between socio-economic and class factors and voting behavior. Race, he said, was "very significant" in explaining voting behavior, and has continuing significance. [63] In fact, because of the constant relationship between socio-economic conditions, such as the race of voters, it is actually possible to predict voting behavior in the City of Columbia. In McKay's judgment, at-large voting clearly disadvantages blacks.

Earl Black, professor of government at the University of South Carolina and author of *Southern Governors and Civil Rights* (1976), concluded that the chances of a black winning office in the City of Columbia are slim:

They are not able to get that minimum degree of white support given very heavy black support and given relatively high black-to-white turnout. [64]

While blacks have actually won in the Democratic primary, the importance of the primary in city politics has diminished. Because of an influx of Republiican, primarily white, voters, the general election has an added significance, the consequence of which "is that the size of the black vote it diluted when you move from Democratic primaries to the general elections." [65]

Racial bloc voting, because of an "underlying cleavage along racial lines," is a "working assumption as far as politics in Columbia is concerned." "For many—it's most unlikely that they are going to take seriously the question of whether they vote for a black candidate or not." [66] In Columbia, there is a "typical pattern of widespread racial polarization." [67] There is a very strong reason to conclude that although it is not impossible for black candidates to win, it is unlikely, given the nature of the rules of the game. The requirements that blacks have a substantial minority of white allies for support puts a very heavy burden on black candidates, and to this point in time, black candidates in the city council races have not been able to find the 30 percent or 33 percent of the white voters that they need to win.

After reviewing precinct returns for all city elections in which blacks were candidates, Professor Black concluded that "at-large elections of this type put black candidates at a severe disadvantage." [68]

The district court in the Columbia at-large challenge, ruled for the defendants on March 24, 1981. It held that there was "no evidence that blacks cannot be elected under the present system," [69] and that the plaintiffs failed to prove racial discrimination in the use of at-large elections. The court of appeals affirmed on November 17, 1981.

In the meantime, a referendum was approved in December, 1981, providing for a combination of district and at-large voting for the mayor and council. One of the members of the council who opposed the referendum later acknowledged what to the courts has seemed obscure. At-large voting in the City of Columbia, he said, "was a racial issue from day one." [70]

(*e*) *Moultrie, Georgia.*—Moultrie, Georgia has a long history of racial discrimination in elections. John Cross, the owner of a black cab company, attempted to register during the days of the all-white primary in 1941–42, and again in 1943. On each occasion he was denied registration. "On one occasion they told three of us that it was too late in the day. You know, it was about four o'clock and they just closed the window." [71] On another occasion in 1942, "they told us . . . we had to pay poll tax. . . . I was unable to pay." [72] Cross finally registered in 1946 after a federal court declared unconstitutional Georgia's all-white primaries.

Even, then, Cross and every other black voter in the City of Moultrie eligible to participate in the Democratic primary were challenged in 1946 for not having proper voter registration qualifications. No whites were challenged.

It was not until the Voting Rights Act of 1965 that any significant number of blacks registered in Moultrie. Prior to the Act, as of December 19, 1962, only 1,117 blacks were registered to vote in the entire county, 27.4 percent of the eligible population. By contrast, 11,362 whites were registered, 71.1 percent of the eligible population.

Although the Democratic all-white primary has been abolished, the legacy of party discrimination persists. As of 1976, no black had ever served as an officer of the party, and only one black had ever served on the twelve-member county executive committee.

City elections were run on a racially segregated basis as late as May, 1962. White voting booths were located "next to the City Hall, and . . . the Negro polling place in a booth . . . in the fire department." [73] Voter registration lists were also maintained on a racially segregated basis. Neither segregated voting nor segregated registration ended in Moultrie "until the integration issue came up," during the mid-1960's. [74]

Not only have elections been conducted on a racially segregated basis, but municipal elections were traditionally managed by the Moultrie Lions Club, an organization which excludes blacks from its membership. Blacks were occasionally allowed to assist with operating voting machines but the Lions Club never permitted any blacks to certify voters or hold managerial positions. The Lions Club still manages city elections, although at the elections held in 1980, a black women's club was allowed to assist the Lions.

Moultrie also has an aggravated history of violating Section 5, (See pages 44, 56, 61).

The city council has traditionally been unresponsive to the needs of the black community. One of the councilmen, Donnie Turner, said that prior to the time he was elected to the council in 1972, the "council was neglecting the black community," particularly in paving, housing and other services. [75]

Discrimination and inequality based upon race have characterized virtually every aspect of public and private life in Moultrie. Penal facilities were racially segregated until the late 1960's. Law enforcement was racially segregated—the first black policeman was not hired until the mid-1960's, and even then was not allowed to arrest whites. Juries were racially exclusive. Housing for blacks is typically substandard and segregated. Employment opportunities for blacks are depressed. For example, in January, 1972, there were no blacks employed in the city hall and only one "in a building adjacent to City Hall." [76] The majority of blacks presently employed by the council work as either garbage collectors or laborers. Clubs and churches remain for all practical purposes as rigidly segregated now as they were a hundred years ago. Schools were not desegregated until 1970, and then only after bitter, local resistance. Blacks are substantially under-represented on boards and commissions over which the city council has exercised its appointment power.

Black citizens asked the mayor and council in 1975 to adopt a single-member district plan for elections to provide an opportunity for black political participation. As John Cross explained it: as the present at-large system works in Moultrie, the white majority controls the outcome of every single election . . . People get elected who are naturally more responsive to the needs of whites than they are to blacks." [77] The city council, however, responded that "the present system . . . had worked properly for the entire history of the city" and declined to make any change. [78]

Cross and other blacks filed a lawsuit in which they claimed that the at-large system of elections was unconstitutional. The district court held on October 26, 1977, there were no barriers to present registration and the at-large system did not preclude "effective participation" by blacks in politics: "the Constitution does not require that elections must be somehow arranged that black voters be assured that they can elect some candidate of their choice." [79]

On appeal, the Fifth Circuit reversed. It held there was "substantial evidence tending to show inequality of access;" that plaintiffs "have demonstrated a history of pervasive discrimination and . . . have carried their burden of proving that past discrimination has present effects;" and, that "plaintiffs have demonstrated recent pervasive official unresponsiveness to minority needs." [80] The case was sent back to the district court.

A second hearing was held on January 25, 1980. A major element of the city's case was the election of a black man. Wesley Ball, to city council on May 22, 1979. Ball was a 68-year-old retired former waiter at the Colquitt Hotel in Moultrie. He had a seventh grade education, had never run for office, nor had he ever been involved in any political campaign. He ran against Wilson, the black incumbent, and Cook the white candidate who had withdrawn from the 1978 election.

According to Cook, "most businessmen around . . . white businessmen" had supported Ball or Wilson because if they were defeated by a white opponent, "the ward system would be more effective to come in" and the city might lose its lawsuit. [81] "[T]hey wanted . . . a black post, and they didn't . . . want me on there for that reason . . . said, let them two have it out. . . . Ball and Wilson." [82]

After Ball won the election, someone put a sign on Cook's place of business: "got beat by a black man—business for sale—leaving town." Ball himself said that race has always been critical in city politics. He testified that the primary thing" that had caused black candidates to lose in elections for the City Council was race: "It's been on racial lines." [83]

In addition to evidence of "cuing" by whites to give the appearance of racial fairness to city elections, the plaintiffs showed that: the Lions Club continues officially to participate in management of city elections; as recently as the 1979 elections, black voters were turned away from the polls by members of the Lions Club; city officials continue to ignore Section 5 of the Voting Rights Act of 1965—an uncleared literacy test was implemented in 1979 for new poll workers (presumably black) who responded to a newspaper ad and volunteered to assist the Lions Club in conducting city elections; and, the city council voted in 1979 strictly along racial lines to retain at-large elections without citing any non-racial reasons supporting the majority's vote.

Following the rehearing, the district court ruled once again against the plaintiffs, concluding that the at-large system in Moultrie was not discriminatory. The plaintiffs appealed. The Fifth Circuit, relying upon *City of Mobile*, held that plaintiffs must prove unresponsiveness in order to establish vote dilution, and because the district court had found responsiveness by the Moultrie City Council, a finding not permitted to be reversed on the appellate level unless "clearly erroneous," the plaintiffs were absolutely foreclosed from obtaining any relief. None of the evidence of direct discrimination was discussed or even mentioned. It was simply deemed irrelevant.

The plaintiffs have requested the Fifth Circuit to hear the case *en banc* with all of the active judges reviewing the decision.

(*f*) *Harris County, Georgia.*—Black plaintiffs in Harris County, Georgia have also been stymied by *City of Mobile*.

Harris County is 45% black, but no black within living memory has ever been elected to the Commission or any other county office. Blacks did not register in the county until the administration of Franklin Roosevelt. Some blacks voted at that time, but for the next two elections, according to Willis Simpson, a long time resident of the county, "they dug some graves there by the courthouse * * * some short graves and burned some crosses at the crossroads." [84]

Prior to the Voting Rights Act, only 263 blacks were registered to vote in Harris County—8.5% of the eligible population. By contrast, more than 100% of the eligible whites were registered. Following enactment of the Voting Rights Act and the suspension of literacy tests, by August 31, 1967, black voter registration had increased to 1,119, but still only 36.1% of the eligible population. To the present time, black registration remains substantially depressed.

Voter lists in Harris County were maintained on a racial basis until 1964–65. Many blacks did not register to vote in the county simply because of their belief that their votes would not be effective and because of their fears of retaliation, economic and otherwise by the white community.

No black ever served as a poll worker in Harris County until 1972. During that year, both the Department of Justice and local black citizens requested the judge of probate, who runs county elections, to appoint blacks to these positions. In response to the requests, the judge appointed approximately six blacks out of approximately 38 persons to serve as poll workers for the 1972 election. The judge "received a phone call from a man who identified himself as Barry Weinstein of the Civil Rights Division of the Department of Justice to which I said, who else would Barry Weinstein work for. He laughed. He said I was a nice fellow." [85] At the next election in 1974, only one black was appointed to serve as a poll worker.

Prior to the 1975 elections, Willie Simpson, a black man, went to the judge of probate and asked that blacks be appointed as poll workers in the Shiloh area of the county. The judge sent Simpson to the chairman of the Democratic Party, but he took no action. No blacks at all served as poll workers in the 1975 election. In 1976, there were two blacks appointed as poll workers. No black had ever been appointed or served as a poll manager in any election in Harris County.

In 1974, when the county first used voting machines, Willie James Brown, a black resident, wrote to the judge of probate asking that he take action to instruct citizens in the use of the machines. Brown never received a reply.

No black has even been an officer or member of the executive committee of the Democratic Party of Harris County. The chairman has indicated that he does not intend to take affirmative steps to insure greater participation by blacks in Party affairs. "I'm going to mind my own business and I want everybody else to do that, too." [86]

Racial segregation has always been the way of life in Harris County. The county jail remained racially segregated until 1975. Discrimination against blacks in jury selection has been chronic. Desegregation of schools was bitterly contested in Harris County until 1970–71, when litigation by the Justice Department and the threat of termination of funds forced the adoption of a desegregation plan.

At-large elections are devastating for blacks because of chronic bloc voting by whites. Black candidates nearly always run last or next to last in multi-candidate races in the predominantly white precincts. That is true even if the black candidates run well in the city of Hamilton, which has a substantial black population.

In the 1970 primary, for example, Walker, a black, carried the city of Hamilton in a three-way race for county commission post number one, but came in dead last in the four predominantly white precincts of Pine Mountain Valley, Skinners, Upper 19th and Lower 19th. The pattern is repeated in other elections. In 1974, Bowen, a black, carried Hamilton in a three-way race for post number one. He came in last, however, in Pine Mountain Valley, Skinners, Upper 19th and Lower 19th. Blacks running for offices in Hamilton and Pine Mountain, two of the largest towns in Harris County, also consistently go down to defeat.

The present apportionment for the board was enacted by the legislature in 1972. The grand jury in 1966 and 1972, during the time blacks were excluded from its membership, had recommended expansion of the commission to five or seven members elected from residential districts at-large. The state representative who introduced the act followed the recommendation of the grand jury. He also talked to people in the county to ascertain their wishes, but can only recall one black with whom he discussed the proposed legislation. That black opposed the at-large feature and favored a ward system.

As might be expected, county government has been unresponsive to the needs of the black community. For instance, from October, 1963, to November, 1975, the Commission exercised its power to make appointments 98 times. In only three instances were blacks nominated or appointed.

Local officials are either unconcerned or unaware of race discriminaton and its continuing consequences. Commissioner Raymond Reames, for example, said that the under-representation of blacks on boards and commissions "does not concern me. It should concern them." [87] Other commissioners, George Teal and Charles Knowles, were not even aware that racial segregation or discrimination ever existed in Harris County.

Knowles was unaware that no blacks were employed at the courthouse; it "didn't occur" to him that few blacks had been appointed to serve on boards and commissions; he was not aware that schools were ever segregated in Harris County nor that state laws ever required segregation; he was not aware that prisons and jails were ever segregated and was largely unaware of the condition of race relations in Harris County;

Teal, who had been on the commission 34 years, didn't remember schools in Harris County had ever been segregated—at least not until after his deposition had been recessed; he couldn't recall if penal facilities were racially segregated at one time; he had no knowledge if public accommodations in the county were ever segregated on the basis of race; he couldn't recall whether a predominant number of whites had been appointed to boards and commissions; he knew of no statute or practice in Harris County providing for separation of the races; he couldn't recall whether blacks were ever excluded from the affairs of the Democratic Party nor whether the present members of the Democratic Committee were all white; he was not aware of whether blacks worked at the polls during elections.

The judge of probate was "not aware of any particular problem" that the black community might have. [88] Commissioner Knowles said no special needs or problems "had . . . been made known to me by the black community." [89] His concern was that "all people are not responsive to the government." [90] Commissioner Reames didn't "know of any" lingering effects from segregation. [91]

In jurisdictions like Harris County, social and private contacts are crucial in the operation of the political process. Candidates rarely run on issues. The judge of probates campaigns have involved no issues and no platform. He has run on his "personality." [92] The success of candidates depends upon friendships and personal contacts built up over the years, but because of the continuing segregation that exists in Harris County, black candidates have fewer opportunities than whites to establish contacts in the majority white community.

When Brown ran for coroner in 1972, he felt unable to campaign in the white neighborhoods because of an atmosphere of racial prejudice, and as a result was unable to establish political alliances with the white community. He received invitations to speak to black groups, but never to white groups or organizations. Since blacks were excluded from membership in social and civil clubs in Harris County, and because the legacy of racial segregation exists, opportunities for black candidates to draw upon personal ties and connections in the white community are severely limited.

Brown and other Harris County blacks filed suit in 1975, alleging that at-large elections for the county government discriminated against minorities. Following a lengthy hearing the district court found the plan had neither the purpose nor the effect of diluting minority voting strength. Subsequently, on May 22, 1980, the Court of Appeals vacated the decision and sent the case back to the district court for further consideration in light of *City of Mobile*.

(*g*) *Alabama.*—In 1964, one year before the enactment of the Voting Rights Act, the Supreme Court decided *Reynolds* v. *Sims*, [93] which applied the one-person-one-vote principle to the legislative apportionment of the State of Alabama. *Reynolds* was not a race case, but its subsequent implementation eliminated multi-member districts in both houses of the Alabama legislature, allowing blacks to hold office for the first time since Reconstruction.

Alabama, despite a state constitutional provision requiring dicennial reapportionment, had failed to reapportion itself for seventy years, resulting in rural domination of the legislature. Following *Reynolds* v. *Sims*, Alabama adopted redistricting for both houses of the legislature. The district court approved the senate plan, despite use of at-large elections in the three largest cities, but held the house plan unconstitutional because of unjusified size deviation and because majority black countries were lumped together with white counties creating at-large seats when single-member districts could have been used. Reciting the state's history of racial discrimination, it found the conclusion inescapable that some counties "were combined needlessly for the sole purpose of preventing the election of a Negro House member." [94]

The court ordered its own plan for the House into effect and these two plans were to be utilized until the state legislaure had the opportunity to redistrict after the 1970 dicennial census.

After the census, the Alabama legislature drew up no less than four plans, the most balanced of which had a deviation of 24.28%. [95] The court rejected all four plans:

"In sum, all four of the defendants' plans are unacceptable since, in conjunction with their discriminatory effect, they fall considerably short of guaranteeing to each citizen of Alabama that his vote "is approximately equal in weight to that of any other citizen in the State." " [96]

Th court adopted plaintiffs' plan, which used all single-member districts for both legislative houses. The defendants appealed to the Supreme Court and the decision was summarily affirmed. [97]

The district court subsequently said it would still consider a reapportionment plan duly enacted by the state legislature. Such a plan was enacted by the state and after extensive discovery and analysis by plaintiffs, the court rejected it for, among other reasons, failure to prove the plan "racially nondiscriminatory." [98] The Supreme Court affirmed the district court. [99] The implementation of single-member districts has resulted in a state legislative delegation with approximately 25 black members.

(*h*) ***Pickens County, Alabama.***—Elections for the Pickens County, Alabama, County Commission were held from single-member districts for the primary, but at-large for the general election. This scheme was not unusual, for Democratic Party primaries in Alabama determined the election results, and primaries were restricted to white voters until the late 1940's. The Democratic Executive Committee used the same single-member district lines for its primary election for the County Commission.

James Corder and Harry Western, black residents of the county, filed suit on November 15, 1973. They contended that the districts used for both bodies were malapportioned, and that at-large voting in the general elections for the county commission diluted their voting strength. No black had ever been elected to public office in Pickens County.

The district court ruled for the plaintiffs on January 23, 1975, on the one person-one vote claim. The Board of Commissioners adopted new, properly apportioned districts for primary elections, but retained at-large voting for the general elections. The plan was submitted to the Department of Justice, was approved by the Attorney General, and subsequently approved by the court.

The Democratic Executive Committee agreed to adopt the districting plan of the Board, apportioning 8 committee members to each of the county commission districts, and to be elected only by members of each district.

The plaintiffs appealed the use of at-large voting for the Board of Commissioners in the general elections. The reapportionment plan for the Executive Committee, which didn't have general elections, was not objectionable.

The plaintiffs' evidence of dilution from the use of at-large voting included bloc voting, public and private employment discrimination, higher poverty rates in the black community, and black appointments to boards only where required by federal grants or contracts. In spite of this evidence, after two remands for more fact-finding, the Court of Appeals found on March 16, 1981, after the decision in *City of Mobile*, and almost 8 years after the complaint was first filed, that the use of at-large elections in the general elections was constitutional. [100]

6. Non-Racial Vote Dilution or Denial

The requirement of proving invidious purpose in *City of Mobile* has not, significantly, been applied when the group claiming vote denial or dilution has been a non-racial minority.

(*a*) *Tuscaloosa County, Alabama.*—Residents of Tuscaloosa County, Alabama filed suit in 1974, complaining that the practice of allowing residents of the City of Tuscaloosa, which had its own school system, to vote in county school board elections diluted their voting strength. The Court of Appeals agreed and held that the double voting scheme "impermissibly dilutes the voting strength of the county electors and that the City of Tuscaloosa electors do not have a substantial interest in the election of the county board members that warrants their right to participate." [101] Although the case was decided after *City of Mobile*, the court did not find that invidious purpose to dilute the vote of county residents existed, nor even suggest that it was necessary. The voting plan was invalidated solely because of its adverse impact upon the voting strength of county residents.

(*b*) *Walker County, Alabama.*—A challenge to "double-voting" in Walker County, Alabama, similar to that in Tuscaloosa County, was defeated because the court found that city residents had a substantial interest in county schools, based upon student cross-overs, shared facilities and tax revenues. [102] The case was decided in 1976, prior to *City of Mobile*, but less than a month before *Nevett* v. *Sides*, in which the Fifth Circuit held that discriminatory purpose must be shown to establish vote dilution in race discrimination cases. There is no suggestion in the Walker County case, however, that county residents had to show invidious purpose to establish dilution of their votes.

(*c*) *Tuscaloosa County, Alabama.*—Another lawsuit by residents of Tuscaloosa County, Alabama, presented the converse of a normal vote dilution claim.

Alabama law grants municipalities a police jurisdiction zone, either a one-and-a-half or three-mile band outside the city limits, in which the city may enforce its municipal ordinances, including various tax and inspection laws. Residents living outside the City of Tuscaloosa filed a lawsuit in 1973, challenging the right of the city to exercise extraterritorial powers over them because they could not vote in city elections. They did not seek the right to vote, only that they not be governed by officials whom they had no power to elect.

The lower federal courts denied relief and the plaintiffs appealed to the Supreme Court. It upheld the constitutionality of Alabama's police jurisdiction law.

According to a majority of the Supreme Court, the case presented no voting rights issues, since "a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." [103] The issue was thus not whether plaintiffs were properly excluded from voting, but whether the statute bore some rational relationship to a legitimate state purpose. The court found that it did.

Alabama's police jurisdiction statute, enacted in 1907, was a rational legislative response to the problems faced by the state's burgeoning cities. [104]

Nowhere in the Court's opinion, is there any suggestion that plaintiff's burden of showing a denial of equal protection included any element of proof of individuals purpose.

7. *Full State Laws*

Full slate, or anti-single shot, laws are acknowledged as favoring majority race candidates. [105] Under a full slate requirement, voters are required to vote for as many positions as there are to be filled in a particular race, rather than only for the candidate or candidates of their choice. In races with fewer black candidates than positions to be filled, minority voters are required essentialy to vote against black candidates by also voting for white candidates, thereby diluting the effectiveness of limited, or single shot, voting.

(*a*) *Rock Hill, South Carolina.*—Voters in the 1973 Rock Hill, South Carolina Democratic primary election for city council were instructed to "Leave 2-Scratch 4," *i.e.*, they were told not to vote a single shot ballot. The previous year a federal court had found unconstitutional on equal protection grounds the state's full slate law used in connection with a numbered seat requirement for the state House of Representatives. The Democratic Party, however, had left its corresponding full slate rule untouched.

As a result of the ballot instructions, an undetermined number of voters, principally those supporting a black candidate C. G. Davis, cast a coerced second vote for an opposition candidate. Many of these second votes may have been cast for white candidate O. Hugh Rock, enabling him to be elected without a runoff. Had it not been for the coerced votes, it is likely that Davis, the third highest voter getter, would have forced a runoff.

Davis, in fact, had geared his entire race to the strategy of urging his supporters to single shot, *i.e.*, to vote for him and no other candidate. Many of his supporters, however, voted for an additional candidate because they felt to do otherwise would void their ballots.

Losing candidates and voters filed suit to void the full slate law and require new elections. Prior to trial the full slate issue was settled by consent of the parties. [106] The defendants agreed in all future primary elections to design the ballot so that it did not state or imply that voters must vote for as many candidates as there were offices to be filed. The defendants also agreed to notify each member of the State Democratic Executive Committee and the Chairman of each County Executive Committee that pursuant to court order no ballot could be used in any primary which directed or suggested the use of a full-slate requirement, and that use of any such requirement would create the risk of having the election declared invalid and a new election ordered.

The plaintiffs abandoned their claim to injunctive relief requiring new elections.

(*b*) *Louisville, Georgia.*—The City of Louisville, Georgia in 1974 changed the method of its elections from plurality to majority vote, adopted a numbered post requirement, and abolished its anti-single shot law. The legislation was submitted to the Attorney General and he objected to the majority vote and numbered post requirements, but not to the abolition of the anti-single shot law.

Local officials took the position that the objection had the effect not only of blocking the majority vote and numbered post requirements, but of reviving the anti-single shot law.

The anti-single shot law was enforced until the state Attorney General issued an opinion in 1980 that such provisions were in violation of state law. At the next elections, a black, urging his supporters to vote single shot ballots, won a seat on the city council.

8. Restrictions on Registration and Voting

The abolition of "tests or devices" by the Voting Rights Act in 1965 removed the major barrier to black voter registration. But vestiges of past discrimination remained.

(*a*) *South Carolina* (*disqualifying offenses*).—One of the provisions adopted at the South Carolina Disfranchising Convention of 1895 was a law disqualifying persons from voting upon conviction of certain offenses. The offenses chosen, according to both contemporary and modern historians, were those to which blacks were thought to be especially prone: thievery, adultery, arson, wife-beating, housebreaking, and attempted rape. Such crimes as murder and fighting, to which whites were thought to be as disposed as blacks, were significantly omitted from the list.

The statute was attacked in 1975 by Gary Allen, a black car dealer in Aiken. Allen had been convicted of the crime of forgery in the state court and was struck from the voting rolls for having committed a disqualifying offense. He contended that the disfranchising statute was an unconstitutional crazy quilt; discriminated on the basis of race; and, violated the Act of June 25, 1868, 15 Stat. 73, readmitting South Carolina into the Union upon condition that it should never deprive any citizen of the right to vote except as a punishment for crimes made felonies at common law.

The district court on June 13, 1979, ruled on the first of Allen's contentions, holding that "South Carolina's list of disfranchising crimes is so discriminatorily selected that it is unconstitutional as a denial of equal protection." [107]

The state appealed and the Fourth Circuit sitting *en banc* reversed. It held that the statute was not facially unconstitutional because Section 2 of the Fourteenth Amendment gave the states unreviewable power to disqualify persons convicted of crime. It sent the case back to the district court to determine whether the statute was enacted to discriminate agains blacks.

Several days later, the Governor of South Carolina signed into law an act amending the statute which had been enacted by the legislature following the district court's opinion. The new law, which is conceded to be constitutional, disfranchises only those convicted of a felony carrying a penalty of five years or more, and only during the time of service of sentence.

Allen subsequently filed a petition for writ of certiorari with the Supreme Court asking that the unreviewed opinion of the Court of Appeals be withdrawn and the complaint dismissed as moot so that it would have no precedential value. Certiorari was granted on October 5, 1981 and the judgment of the Court of Appeals was vacated on grounds of mootness.

(*b*) *South Carolina* (*absentee balloting*).—South Carolina allowed absentee balloting to several classes of persons, including anyone "physically unable to present himself at his precinct on election day." [108] The Attorney General of the state issued an opinion that the phrase "physically unable" was limited to "health reasons," [109] and did not include those whose employment prohibited them from going to the polls. This interpretation of the statute was entirely consistent with the traditional state practice of making it as difficult to vote as possible.

A group of voters whose employment would take them away from the polls on election day, asked the federal court in 1972 to require election officials to issue them absentee ballots to vote in the primary. The court granted plaintiffs' motion for a temporary restraining order and enjoined the party officials from denying the absentee ballots.

Subsequently, the South Carolina General Assembly amended state voting laws, allowing persons who would be out of their counties of residence on election day because of their employment to vote absentee. This action of the legislature, granting the plaintiffs the relief they sought as a matter of state law, mooted their federal lawsuit.

(*c*) *Wilcox County, Alabama*.—When black voters went to the polls in Wilcox County, Alabama, to vote in the general election in 1972, some of them met with discriminatory practices that were old and familiar. Many precincts were located at private establishments, such as retail stores. The right to cast a secret ballot was unknown. Voters were required to cast their ballots, if at all, after marking them out in the open on feed sacks, store counters, etc. White poll officials looked at the marked ballots before placing them in the ballot box. Some black voters were denied a ballot altogther because they refusd to addrss poll officials as "sir."

Black voters who had been registered by federal registrars in 1965 and had since moved within the county were not allowed to vote at their new precincts because, according to local officials, federal records could not be altered. Requests for absentee ballots were held until the last possible day, so that they would have to be mailed back immediately or they would arrive too late to be counted.

The National Democratic Party of Alabama, a predominantly black political party, nominated persons in 1972 for each of 21 constable positions up for election in Wilcox County. The job of constable, not one of overwhelming importance, had been overlooked by the Democratic and Republican parties. By the time the NDP filed its list of nominations, it was too late under state law for other parties to add nominations.

Nonetheless, the county Democratic Party placed on the ballot the names of various people for the positions of constable. Not only was this in violation of state election law, but many persons whose names were placed on the ballot had no knowledge that this was being done and were not allowed to have their names removed. As a result of this strategem, many of the black party candidates lost the election.

Subsequently, six black residents of Wilcox County filed suit in federal court. On November 7, 1973, the court entered a consent order which enjoined all of the complained of practices. [110]

The defendants promised to promptly and properly process absentee applications and ballots, explain the right and allow the casting of challenged ballots, not place anyone's name on a ballot without that person's consent, not discriminate in the selection of poll officials, make all feasible efforts to locate polling places on public premises, provide privacy in balloting and specifically instruct poll officials not to open or view ballots prior to official counting, provide written instructions to all poll officials, not discriminate in any manner against black voters and candidates and make appropriate changes on the voters list to reflect new precincts of those who moved within the county.

(*d*) *Georgia.*—Georgia, faithful to the Southern tradition of restricting the franchise to white males, had a statute derived from the common law that a married woman could not establish a domicile for voting purposes different from that of her husband. Patricia Kane, a former resident of New Jersey, moved from that state in 1961. She later moved to Albany, Georgia, and tried to register to vote, but was turned away because her husband, a Marine Corps officer assigned to Albany, retained his legal residence in New Jersey.

Kane filed suit in federal court in 1973 contending that the Georgia law discriminated on the basis of sex and deprived her of the right to vote. A three-judge court (required at that time to hear the challenge to a statewide statute), entered an order declaring the Georgia Code, it said, "in so far as it establishes an irrebutable presumption that the domicile and residence of a married woman is that of her husband, and thereby prevents her from registering to vote in Georgia, violates the nineteenth amendment of the Constitution of the United States." [111]

(*e*) *Tennessee.*—Durational residency requirements were a common method of restricting the franchise to the supposedly more stable white community and excluding migratory blacks. Tennessee had such a law, *i.e.*, residence in the state for a year and in the county for three months.

James Blumstein moved to Tennessee in June, 1970, to take a job as a law professor at the University of Tennessee in Knoxville. Several weeks later he tried to register to vote, but was turned down because he didn't satisfy the state's durational residency requirement. He filed a lawsuit which made its way to the Supreme Court two years later. The court held the state law unconstitutional.

Acknowledging that states may impose restrictons on the franchise to assure that only bona fide residents vote, the Court found that durational residency requirements do not serve that interest in the least restrictive manner. Rather, they discriminate between newly arrived and long time residents, all of whom are bona fide residents. The Court gave weight to the provision of the Voting Rights Act which abolished durational residency requirements for presidential elections. "[T]he conclusive presumptions of durational residence requirements are much too crude. They exclude too many people who should not, and need not, be excluded." [112]

The effect of the decision was to render invalid similar requirements in many states of the Union.

(*f*) *Georgia.*—After the decision in the Tennessee case, *Dunn v. Blumstein*, a federal court held Georgia's one year durational residency requirement unconstitutional. [113] The state, however, continued to administer a 1968 law requiring voter registration to be cut off 50 days prior to election day. Plaintiffs, who were denied registration after the cut-off period, sued in federal court, relying upon *inter alia*, the Court's language in *Dunn*, "that 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary."[114] Nonetheless, the District Court found 50 days to be "reasonable" and dismissed the claim.[115] The Supreme Court affirmed in a *per curiam* opinion, stating that "the 50-day registration period approaches the outer constitutional limits in this area."[116]

Georgia subsequently repealed the 1964 statute and enacted a 30-day registration cut-off period.

(*g*) *Young Harris, Georgia.*—Challenging the registration of individual voters was a common method of excluding blacks from the electorate and was widely used after abolition of the all-white primary in the mid-1940's. A more recent example of class-based challenges took place in Young Harris, Georgia in 1980.

Prior to the August, 1980 primary elections in Towns County, over one hundred long time residents filed a voting challenge against 104 registered voters, all of whom were students at Young Harris College. The sole evidence alleged of non-eligibility was their student status.

The Board of Registrars scheduled hearings on the challenges, whereupon the plaintiffs filed suit in federal court charging that the board was applying an unconstitutional presumption of non-residency to students in derogation of the right to vote.

The evidence at the federal trial showed that while the registrars made some effort to determine residency by checking car registrations, etc., this was not done until after the board had decided to go forward with hearings on the challenges. State law required that in order to schedule hearings, the board was required to find probable cause that the person challenged was not a resident. The probable cause in this case thus was based solely on student status.

The district court entered a preliminary injunction on October 31, 1980 permitting all the students to vote in the 1980 general election.

As the passage of the tweny-sixth amendment makes clear, the college age population is expected to participate actively in the government of this country through the exercise of their right to vote. If by an uneven application of electoral requirements this right is denied them in the formative stages of their growth as responsible citizens, then everyone will suffer as a result.[117]

The case was concluded after the board of registrars restored the students' names to the official voter registration list and agreed not to proceed with any challenges based solely on student status.

9. *Restrictions on Candidacy*

Minorities may be effectively excluded from equal political participation by such devices as onerous filing fee requirements and candidate slating procedures. A remarkable example of exclusionary candidate slating exists in the City of Thomaston, Georgia.

(*a*) *Thomaston, Georgia.*—Prior to 1979, Thomaston had never had a black to serve on its seven-member City Board of Education. That was a consequence of its peculiar candidate or member selection system.

In 1915, the Georgia General Assembly created the Board of Education of Thomaston to operate a public school system for the city. The 1915 statute absorbed the then existing R. E. Lee Institute, a private academy whose charter required segregation, into the public system and made R. E. Lee Institute's seven-member, all-white board of trustees Thomaston's Board of Education with powers of self-perpetuation. One new member was slated and appointed each year by the incumbents to a seven year term.

A separate school system existed "for colored youths" known as the Thomaston Starr School.[118] It was never the equal of R. E. Lee Institute. The Starr

School frequently opened later than the white school and frequently closed earlier.

Ten years after the decision in *Brown* v. *Board of Education*,[119] the superintendent of schools "strongly" stressed the need for keeping the black schools in a state of repair because of "the present situation in Georgia.[120] There was considerable opposition to desegregation of schools. In 1956, the superintendent ceased deducting National Education Association dues from teachers' checks, "since the NEA has taken a stand against segregation."[121]

Because of the self-perpetuation method of choosing school board members, no blacks were ever chosen, and certain local white families in Thomaston dominated membership of the Board. The Hightower family has placed six of its members on the Board; the Adams family five; and the Hinson, Varner and Thurston families have each placed two of their members on the Board.

Suit was filed on May 23, 1979, by black residents of Thomaston who charged that board member selection procedures were discriminatory. Several months later, the Board elected one of the plaintiffs, Rev. Willis Williams, to its membership. Prior to Williams' selection, blacks had asked the Board to allow members of their race to serve, but no action was ever taken.

The District Court ruled against the plaintiffs, but on September 21, 1981, the Court of Appeals reversed. It held that "this unique system for selection of the school board that was operated in a discriminatory manner, together with the self-perpetuation of the Board of Education that originated from an all-white board of trustees, is violative of the appellants' rights under the Fourteenth Amendment."[122] It invalidated the self-election method and remanded to the district court with instructions to retain jurisdiction over the case until a new system for selection is chosen. The defendants have appealed to the Supreme Court.

(*b*) *Florida*.—Florida, like many other states, allowed for no other manner to gain ballot access than to pay a filing fee of five percent of the annual salary of the office sought. This long standing practice discouraged all but mainstream, "acceptable" candidates and those affluent enough to pay the filing fee regardless of the seriousness of their candidacy.

Several aspiring candidates challenged the fee system in 1972. The federal court, relying upon a prior Supreme Court decision involving filing fees, held that, while the five percent filing fee was itself valid, "the State must provide an alternative method of obtaining a place on the ballot that does not involve the payment of a substantial sum of money to the State,"[123] An interim remedy had been imposed for the impending 1972 elections, allowing candidates for office who were unable to pay the filing fee to petition for inclusion on the ballot by obtaining signatures of registered voters. The number of signatures varied, depending upon whether the office was statewide or local and the population of the relevant district or county.

Plaintiffs took a partial appeal to the Supreme Court, arguing that since 91 of the filing fee went unencumbered to the political party (and the party did not finance primaries), the fee was not justified by any compelling state interest. They also challenged the district court's remedy to the extent that it required candidates in multi-member districts to gather up to six times the numbers of signatures (in a six member district) than a candidate in a single-member district.

The Supreme Court vacated the judgment of the three-judge district court and remanded for consideration in light of three intervening candidate qualification cases from Texas and California.[124]

Six weeks later the Florida legislature enacted a petitionary statute setting the number of signatures for state-wide office at 115,000 and more than doubling the number formerly required for local offices. The five percent filing fee for those who could afford it was retained.

The district court sustained the new statute as not unconstitutionally burdensome, including the requirement of multimember district candidates having to gather up to six times the number of signatures required of a single-member district candidate. Plaintiffs again appealed but the Supreme Court affirmed without opinion.

(*c*) *Vernonburg, Georgia*.—Georgia law provides that write-in candidates must file notices of their candidacy 20 days prior to the election. In the May, 1978 election for the four commissioner positions in the town of Vernonburg, Georgia, four residents ran a write-in campaign and received more votes than the incumbents.

A critical local issue at the time involved city zoning supported by the incumbents, which generated strong—and adverse—voter interest immediately prior to the elections. Election officials did not initially certify the results but after several days declared the incumbents the winners because the four write-in candidates had not filed notices that they would be write-in candidates as required by state law.

The four write-in candidates brought suit challenging the constitutionality of the notice of write-in provision on the grounds that it served no useful state purpose. On May 19, 1980, the court sustained the statute, finding it had a rational basis, serving to protect the electoral process from last minute distortions and insuring that issues would be aired prior to the election. [125]

(*d*) *Mississippi.*—In traditionally one party states, such as Mississippi, winning the Democratic nomination was tantamount to election to office. As a consequence, denial of party affiliation was for all practical purposes denial of access to the ballot itself. It was for this reason that the Supreme Court declared the all-white primary unconstitutional in 1944. Restrictions on party affiliation and party name, however, have continued into more recent years, with equally severe impact upon blacks.

Following political party delegate challenges in 1964 and 1968, based upon, among other things, the exclusion of blacks, the National Democratic Party recognized and issued its convention call to a predominantly black political party in Mississippi. This party (known as the Loyalists), with its chairman Aaron Henry, was a successor to the Freedom Democratic Party. It also considered itself the successor to the Democratic Party of Mississippi, and attempted to register its officers with the secretary of state and generally to conduct political party business. The secretary of state considered this party a legal non-entity and continued to recognize the Democratic Party of Mississippi (known as the Regulars) which the National Democratic Party had found to discriminate against black citizens.

Aaron Henry found his party faced with numerous legal obstacles. A state statute required political parties to register with the secretary of state, but in order to register, the party had to conduct precinct meetings at the polling places. Many polling places were owned by private persons, were located at segregated clubs, all-white churches, and even private carports. The state took the position that it could not provide access to these polling places since they were private property and because Aaron Henry's party was not registered.

Additionally, the party registration statute prohibited any new party from using any part of the name of a party already registered. Any form of the term "Democrat" was already registered by Aaron Henry's opponents.

Aaron Henry's party conducted precinct, county, congressional and state conventions as best it could in preparation for the 1972 National Democratic Party Convention. Thereupon, they and the National Party were sued in federal court by the Democratic Party of Mississippi (the Regulars). The Regulars sought to enjoin the National Party from doing business with the Loyalists, sought to be allowed to attend the 1979 convention, to recover any money the Loyalists had raised by the use of the name "Democrat," and essentially wanted to put the Loyalists out of business.

The district court refused to issue any injunction, but did remand the Regulars to a convention delegate challenge before the National Party. This challenge was rejected and the Loyalists were again seated at the 1972 convention. The district court did, however, find the Loyalists to have no legal existence and no right to the Democratic Party name.

All parties appealed. The Court of Appeals for the Fifth Circuit reversed the District Court saying:

> [W]e believe that the state's attempt to deprive the Loyalists of the opportunity to describe themselves on the ballot as part of the Democratic Party is an unconstitutional and impermissible restraint on the Loyalists' constitutional guarantees of free association. [126]

In 1976 the two state parties merged and a consent agreement, based upon the invalidation of the party registration statute, was entered by the court.

10. Majority Vote Requirements

Majority vote requirements have been routinely objected to by the Attorney General in Section 5 proceedings, and have drawn a higher percent of rejections than almost any other voting change. Constitutional litigation, by contrast, has not proven to be nearly as effective in blocking the identical voting requirement.

(*a*) *Georgia.*—In 1964, a year before enactment of the Voting Rights Act, Georgia enacted a statute which required a majority vote in Congressional elections. Andrew Young and Julian Bond filed a lawsuit in 1971 before the next regularly scheduled elections charging that the law was racially discriminatory. The reason for filing suit in advance of the elections was to insure an orderly, non-disruptive decision. But the federal district court found the complaint too speculative and not ripe for adjudication: "We do not know what Congressional races [the plaintiffs] seek to enter or vote in, how many candidates will be in each race, and whether those candidates will be white, black, or members of some other minority." [127] The Supreme Court affirmed.

There is little doubt that had the majority vote requirement been enacted after 1964, it would have been objected to under Section 5.

11. Protection of Voting Rights by State Courts

State courts have a generally uneven record of enforcing minority voting rights, making even more critical the continuation of existing federal protection.

(*a*) *Tuscaloosa County, Alabama.*—In 1971, the State of Alabama enacted a local law applying to Tuscaloosa County, Alabama, which required the Board of Registrars to conduct Saturday registration once a month during October through January. The Board refused to comply with the state law.

The League of Women Voters, concerned about the restrictions on opportunities for voter registration, particularly of blacks and daily wage earners in the county, brought suit against the Board to require it to conduct registration on Saturdays. [128] Since the suit sought to enforce a state law, the complaint was filed in state court. The state courts, however, denied relief. The Alabama Supreme Court said that "a thing may be within the letter of a statute, but not within the meaning; or within the meaning, but not within the letter." What that meant was that although the law said registration had to be conducted on Saturday, the Tuscaloosa County registrar didn't have to do it.

(*b*) *Edgefield County, South Carolina.*—Blacks in Edgefield County, South Carolina got enough names on a petition to require the calling of a referendum whether the county government should abolish at-large voting in favor of single member districts. No black has ever been elected to the county council running at-large. Local officials refused to call the referendum, and the state courts declined to grant any relief. The Supreme Court of South Carolina said the signatures hadn't been filed in time to give "reasonable notice" of the election. [129]

(*c*) *Wadley, Georgia.*—In Wadley, Georgia, a black lost an election to the white incumbent by only 4 votes. He filed a state election challenge and showed, among other things, that more votes were counted than people had voted, and that 12 absentee ballots had been cast in violation of state law. The state courts declined to set aside the elections on the ground that the inconsistencies or violations were "mere irregularities." [130]

(*d*) *Clay County, Georga.*—State election challenges on behalf of blacks in Clay County were similarly dismissed on the basis that violations of state law in issuing absentee ballots—which provided the margin of victory for 2 white candidates—were "mere irregularities." [131]

(*e*) *Greenville, Georgia.*—At least one election challenge by a defeated black candidate was successful, Tobe Harris in Greenville, Georgia. A state court set aside the election in which Harris lost by 2 votes after finding that the returns of the election and the ballot box were mishandled after the votes were tabulated, that votes were improperly counted, that the city failed to comply with state election law, and that non-residents had voted.

Shortly after the ruling, three blacks were charged with election law violations, two with having voted but not being residents, and a third with assisting his illiterate parents in voting without getting prior approval from election officials. No charges were brought against any white election officials, in spite of the findings by the trial judge that official misconduct had occurred. Charges were all eventually dismissed after the three black defendants filed motions to quash based upon selective racially motivated prosecution.

(*f*) *Talladega County, Alabama.*—A common campaign practice in Alabama has always been to distribute handbills or facsimile ballots with particular candidate's names marked. Emmet Gray, a black school teacher from Talladega County, had such handbills in his possession when he was arrested by local police on the June, 1974 primary election day. He was charged with violating state law which made it a crime to do any number of constitutionally protected activities on election day, including soliciting votes and "passing our [sic] sample ballots that were marked for certain candidates." [132] The racial impact, if not the purpose, of such bans on electioneering is apparent. Gray was convicted by a local jury, fined $500, sentenced to two months hard labor, plus 167 days for payment of the fine and 40 days for the costs.

He appealed, claiming the state statute was unconstitutional. The Supreme Court of Alabama avoided that issue, finding that the proof (that he possessed the handbills, talked to black voters) was insufficient to convict. The statute has since been repealed.

NOTES

1. 425 U.S. 130 (1976).
2. *Ibid.*, at 141.
3. 412 U.S. 755, 765–66 (1973).
4. The plurality in *City of Mobile v. Bolden*, 446 U.S. 55 (1980) identified these factual elements as determinative in proving purposeful discrimination.
5. 485 F.2d 1297 (5th Cir. 1973) (*en banc*).
6. *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir. 1977) (*en banc*); *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978).
7. *Annual Report of the Director of the Administrative Office of the United States Courts, 1980* Table X-2, Civil and Criminal Weights by Nature of Suit or Offense, p. A-161.
8. *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).
9. *Nevett v. Sides*, 533 F.2d 1361, 1366–72 (5th Cir. 1976).
10. *Bowdry v. Hawes*, Civ. No. 176–128 (S.D. Ga.), Defendants' counterclaims.
11. *Williams v. Ezell*, 531 F.2d 1261, 1264, (5th Cir. 1976).
12. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978).
13. *Annual Report of the Administrative Office of the United States Courts, 1980*, Table 28, 70.
14. 446 U.S. 55, 100 S. Ct. 1490.
15. *Ibid.*, 100 S. Ct. at 1503.
16. *Ibid.*, 100 S. Ct. at 1502 n. 17.
17. 100 S. Ct. at 1514, 1519.
18. *McMillan v. Escambia County*, 638 F.2d 1239, 1249 (5th Cir. 1981).
19. *Lodge v. Buxton*, 639 F.2d 1358, 1375 (5th Cir. 1981).
20. *Cross v. Baxter*, 639 F.2d 1383 (5th Cir. 1981), citing *Lodge v. Buxton, supra*.
21. *Allen v. State Board of Elections*, 393 U.S. 544, 566n. 31 (1969).
22. *Lodge v. Buxton, supra*, Brief for the United States as Amicus Curiae, 51.
23. *See, e.g., Toney v. White*, 476 F.2d 203 (5th Cir. 1973), finding that voter irregularities violated both the Constitution and Section 2.
24. *Bowdry v. Hawes*, Civ. No. 176–128 (S.D.Ga. Jan. 3, 1978).
25. *NAACP Of Coffee County v. Moore*, Civ. No 577–25 (S.D.Ga.).
26. *Berry v. Doles*, Civ. No. 76–139 (M.D.Ga.).
27. *Holloway v. Faust*, Civ. No. 76–28.
28. *Sullivan v. DeLoach*, Civ. No. 76–238 (S.D.Ga. Sept. 11, 1977).
29. *Wilkerson* v. *Ferguson*, Civ. No. 77-30-AMER (M.D.Ga.)
30. *Holloway v. Raines*, Civ. No. 77–27 (M.D.Ga.).
31. *Butler v. Underwood*, Civ. No. 76–53 (M.D.Ga.).
32. *The Atlanta Constitution*, October 11, 1963; October 22, 1963.
33. *United States v. Chappell* and *Bell v. Horne* (M.D.Ga 1965), 10 R.Rel.L. Rpter. 1257.
34. 376 F.2d 639, 644 (5th Cir. 1967).
35. *Lloyd v. Alexander*, Civ. No. 74–291 (D.S.C. March 31, 1976), slip opinion, 11.
36. *Ibid.*, 16.
37. *Hatton v. City of Henderson, North Carolina*, No. 75–2061 (4th Cir. June 3, 1976) (unreported).
38. *Medders v. Autauga County*, Civ. No. 3805-N (M.D. Ala. 1973).
39. The decision was rendered prior to *Dallas County v. Reese*, 421 U.S. 478 (1975), which rejected similar constitutional claims based solely on malapportioned residency districts.
40. *Lodge v. Buxton*, 639 F.2d 1358, 1377 (5th Cir. 1981).
41. *Ibid.*
42. *Ibid.*
43. *Ibid.*, at 1378.

44. *Ibid.*
45. *Ibid.*, at 1379.
46. *Ibid.*
47. *Ibid.*, at 1381 and n.46.
48. *Bailey v. Vining*, 514 F.Supp. 452, 463 (M.D.Ga. 1981).
49. *Ibid.*
50. McDonald, "Voting Rights on the Chopping Block," *Southern Exposure*, May, 1981, 90–1.
51. *McCain v. Lybrand*, Civ. No. 74–281 (D.S.C. April 17, 1980), slip opinion, 20.
52. *Ibid.*, 8–15.
53. *Ibid.*, August 11, 1980.
54. C. Benet, A Campaign for a Commission Form of Government," *The American City*, 1910, 277–78.
55. Benet, 277.
56. "Fight Ahead for Columbia," *The State*, January 25, 1910.
57. 247 U.S. 483.
58. *Journal of Proceedings of the House of Representatives of South Carolina*, 1957, 918.
59. *Ibid.*, 1956, 936–37.
60. *Washington v. Finlay*, Civ. No. 77–1791 (D.S.C.), trial transcript, 117–18.
61. *Ibid.*, 137.
62. *Ibid.*, 139.
63. *Ibid.*, 20, 22.
64. *Ibid.*, 55.
65. *Ibid.*
66. *Ibid.*, 56, 57.
67. *Ibid.*, 62.
68. *Ibid.*, 69.
69. *Ibid.*, slip opinion, 9.
70. "Mayor Speaks Out," *The State*, December 11, 1981.
71. *Cross v. Baxter*, Civ. No. 76–20 (M.D. Ga.), trial transcript, 30.
72. *Ibid.*, 59.
73. *Ibid.*, plaintiffs' exhibit 8.
74. *Ibid.*, trial transcript, 39–40.
75. *Ibid.*, trial transcript, 173–74.
76. *Ibid.*, 200–01.
77. *Ibid.*, plaintiffs' exhibit 22.
78. *Ibid.*
79. *Ibid.*, slip opinion, 18.
80. *Cross v. Baxter*, 604 F. 2d 875, 881, 883 (5th Cir. 1979).
81. *Cross v. Baxter* (II), trial record, vol. IV, 187.
82. *Ibid.*
83. *Ibid.*, 67–68.
84. *Brown v. Reames*, Civ. No. 75–80–COL (M.D. Ga.), trial transcript, 115, 118.
85. *Ibid.*, 151.
86. *Ibid.*, 285–86.
87. *Ibid.*, trial transcript, 397.
88. *Ibid.*, trial transcript, 197.
89. *Ibid.*, 266.
90. *Ibid.*, 264.
91. *Ibid.*, 378.
92. *Ibid.*, 192.
93. 377 U.S. 533.
94. *Sims v. Baggett*, 247 F. Supp. 96, 109 (M.D. Ala. 1965) (three-judge court).
95. *Sims v. Amos*, 366 F. Supp. 924, 934 (M.D. Ala. 1972).
96. *Id.*, 936.
97. *Amos v. Sims*, 409 U.S. 942 (1972).
98. *Sims v. Amos*, 365 F. Supp. 215, 223 (M.D. Ala. 1973).
99. *Wallace v. Sims*, 415 U.S. 902 (1974).
100. *Corder v. Kirksey*, 585 F. 2d 708 (5th Cir. 1978), and *Corder v. Kirksey*, 625 F. 2d 520 (5th Cir. 1980).
101. *Phillips v. Andress*, 634 F. 2d 947, 952 (5th Cir. 1981).
102. *Creel v. Freeman*, 531 F. 2d 286 (5th Cir. 1976).
103. *Holt Civil Club v. City of Tuscaloosa*, 439 U.S. 60, 68–9 (1978).

104. *Ibid.*, 439 U.S. at 75.
105. *The Voting Rights Act: Unfulfilled Goals*, a Report of the U.S. Commission on Civil Rights, Washington, D.C., September, 1981, 105.
106. *Cleveland v. Reese*, Civ. No. 73-1618 (D.S.C.).
107. *Allen v. Ellisor*, Civ. No. 75-1411 (D.S.C. June 13, 1979), slip opinion, 6.
108. S.C. Code, Section 23-449.41.
109. *Bly v. McLeod*, Civ. No. 72-988 (D.S.C.) transcript of hearing, August 24, 1972, 9.
110. *Threadgill v. Bonner*, No. 7475-72-P (S.D. Ala.).
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112. *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972).
113. *Abbott v. Carter*, 356 F. Supp. 280 (N. D. Ga. 1972).
114. *Dunn v. Blumstein, supra*, 405 U.S. at 348.
115. *Burns v. Fortson*, Civ. No. 17179 (N. D. Ga. Sept. 27, 1972).
116. *Ibid.*, 410 U.S. 686, 687 (1973).
opinion, 8.
117. *Pinney v. Letourneau*, Civ. No. C80-80G (N. D. Ga. Oct. 31, 1980), slip opinion, 8.
118. Charter of Thomaston Starr School, 1915.
119. 347 U.S. 483 (1974).
120. *Searcy v. Hightower*, Civ. No. 79-67-MAC (M.D.Ga.), plaintiffs' exhibit L-30.
121. *Ibid.*, plaintiff exhibit L-14.
122. *Searcy v. Williams*, ___F.2d___ (5th Cir. Sept. 21, 1981, slip opinion, 11519.
123. *Fair v. Taylor*, 359 F. Supp. 304, 306 (M. D. Fla. 1973).
124. *Lubin v. Panish*, 415 U.S. 709 (1974); *Storer v. Brown*, 415 U.S. 724 (1974); *American Party of Texas v. White*, 415 U.S. 767 (1974).
125. *James v. Falligant*, No. C. U. 479-199 (S. D. Ga.).
126. *Riddell v. National Democratic Party*, 508 F.2d 770, 779 (5th Cir. 1975).
127. *Bond v. Fortson*, 334 F. Supp. 1192, 1194 (N. D. Ga. 1971).
128. *League of Women Voters v. Renfro*, 290 So. 2d 167, 168 (1974).
129. *McCain v. Edwards*, 272 S.C. 539, 252 S.E. 2d 924 (1979).
130. *Johnson v. Rheney*, 245 Ga. 316 (1980).
131. *Richardson v. Crozier*, Civ. No. 33-80 (Sup. Ct. Clay County); *Ricks v. McKemie*, Civ. No. 34-80 (Sup. Ct. Clay County).
132. *Gray v. State*, 315 So. 2d 612, 613 (1975).

CONCLUSIONS AND RECOMMENDATIONS

1. *Section 5 of the Voting Rights Act of 1965 should be continued.*

Racial minorities have made progress in office holding and voter registration since enactment of the Voting Rights Act, but as this report documents, there is still widespread resistance to equal political participation. Resistance has included the continued enactment of discriminatory voting procedures, pervasive, widespread non-compliance with Section 5, the non-submission of changes and disobedience or evasion of objections from the Attorney General.

Conversely, there is not evidence that jurisdictions covered by Section 5 have made voluntary, constructive efforts to eliminate discriminatory election procedures, such as at-large voting or majority vote requirements, or otherwise facilitate minority political participation. Ameliorative changes that have occurred have been the result of enforcement of Section 5 or traditional federal lawsuits. The record shows that preclearance is still needed to safeguard the equal right to vote.

Affirmative litigation is not an acceptable alternative to Section 5 in blocking discriminatory changes in voting. Litigation places an enormous burden of expense and delay upon minorities, and its results are inconsistent. It is inconceivable that the more than 800 voting changes objected to by the Attorney General under Section 5 could all have been to by the Attorney General under Section 5 could all have been challenged in traditional, local lawsuits, or if challenged, that plaintiffs would have invariably prevailed. Section 5 is inexpensive, efficient and has insured reliability in decision making. It should be continued.

2. *Congress should strengthen enforcement of the Voting Rights Act by: (1) giving the Attorney General the affirmative duty of monitoring state and local election law changes and requiring pre-clearance; and (2) by providing damages in favor of aggrieved persons for failure of local officials to comply with the Act.*

Section 5 enforcement has relied primarily upon voluntary compliance by covered jurisdictions. As this report documents, many jurisdictions have ignored

Section 5, while the minority community lacks the resources adequately to police voting rights violations. In order to insure compliance with pre-clearance, the Attorney General should be given the affirmative duty by Congress of monitoring state and local election law changes in covered jurisdictions and requiring pre-clearance.

The Voting Rights Act should also be amended to provide damages in favor of aggrieved persons for failure of local officials to comply with the Act. The criminal sanctions presently contained in the Act have never been used, and have thus had no deterrent effect on voting rights violations. The addition of a damage provision enforceable by aggrieved persons would provide a strong, new incentive to local officials to comply with the law and escape financial liability.

Under the present Act, the victims of voting rights violations are without an adequate remedy. The plurality winning black candidate, for example, who is defeated in an uncleared, illegal runoff, has no remedy other than to enjoin future use of the change and seek new elections. There is no way he or she can be compensated under the present law for the exclusion from office. An amendment of the Act to allow the victims of voting rights violations to recover damages would close the present gap in the law, act as a strong deterrent to violations, and would further the intent of Congress to insure equality in voting.

3. *Section 2 of the Voting Rights Act should be amended to clarify the original intent of Congress that election procedures are unlawful which have a discriminatory purpose or effect.*

The legislative history of the Voting Rights Act makes clear that Congress intended for Section 2, in *pari materia* with Section 5, to prohibit election practices which have a discriminatory effect regardless of their purpose. A plurality of the Supreme Court in *City of Mobile*, however, concluded that Section 2 is co-extensive with the Fifteenth Amendment and prohibits only purposeful discrimination. The proposed amendemnt to Section 2 would thus merely clarify the original intent of Congress.

Prior to *City of Mobile*, a violation of Section 2 could be established by circumstantial and other evidence, including the effect of the challenged procedure. Amendment of Section 2 would essentially restore the law as it existed prior to the *City of Mobile* decision, by providing that direct, or "smoking gun," evidence of purpose is not required for a statutory violation.

As this report demonstrates, election practices, such as at-large voting, that were enacted prior to the effective pre-clearance date of Section 5 continue to exploit past discrimination and effectively exclude minorities from the political process. Since *City of Mobile*, however, it has become increasingly difficult and sometimes impossible successfully to challenge these pre-Section 5 practices. Local officials invariably deny that they discriminate, and it is generally impossible to find other direct evidence of racial purpose. The amendment of Section 2 would insure that statutory challenges to discriminatory voting procedures would not have to meet the highly artificial and unrealistic burden of proof required for constitutional challenges by *City of Mobile*.

Some lower federal courts, since *City of Mobile*, have held that minority plaintiffs must meet the threshold test of showing that elected officials are unresponsive to their needs in order to establish a violation of voting rights. Unresponsiveness is a highly subjective standard that invites impressionistic—and often unreliable—decision making. For example, does the paving of a road in a black neighborhood after decades of neglect preclude a finding that elected officials are unresponsive to the needs of the minority community? Some trial courts have answered that question in the affirmative, and their decisions have been shielded from meaningful review on appeal by the "clearly erroneous" rule.

It is difficult to draw an objective, principled distinction between at-large voting in Burke County, Georgia, held to be unconstitutional because the trial judge found, *inter alia*, that local officials were unresponsive, and at-large voting in Moultrie, Georgia, held to be constitutional because the trial judge found as a threshold matter that local officials were not unresponsive. Both jurisdictions have essentially identical histories of race discrimination and at-large voting has the same effect of excluding blacks from local politics. The individual facts may vary, but the underlying significance of race, and at-large voting, in each jurisdiction is the same.

Not only do current litigation standards insure inconsistent results in basically identical cases, but the requirement of proving unresponsiveness resurrects the discredited separate, but equal, doctrine of *Plessy* v. *Ferguson* [1] and applies it to voting rights. As long as a jurisdiction provides equal services to its racial minorities, the *Plessy* equivalent of equal railway accommodation, it may retain a separate, or racially exclusive, electoral scheme.

The emphasis by some courts on responsiveness, or provision of services, is simplistic. To paraphrase Chief Justice Warren, who rejected for the Court in *Brown* v. *Board of Education* a similar notion that equal schools meant merely equal "buildings, curricula, qualifications and salaries of teachers and other 'tangible' factors," a racially exclusive electoral system "generates a feeling of inferiority as to their [blacks'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." [2] Stated differently, equal political participation means vastly more than garbage collection and street paving. It means an equal opportunity to elect representatives of one's choice to office.

The provision of a purpose or effect standard in Section 2 would avoid the use of subjective, impressionistic factors and establish in their stead an objective, reliable test for violations of voting rights.

NOTES

1. 163 U.S. 537 (1896).
2. 347 U.S. 483, 492, 494 (1954).

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[From the National Journal, Apr. 3, 1982]

ADVOCATES OF VOTING RIGHTS SAY IT'S ELECTION RESULTS THAT MATTER—CIVIL RIGHTS LOBBYISTS SUPPORT LEGISLATION THAT WOULD ELIMINATE THE DIFFICULT "INTENT" TEST FOR ELECTION OFFICIALS ACCUSED OF VIOLATING THE VOTING RIGHTS ACT

(By Richard E. Cohen)

In something of a twist for a civil rights issue, President Reagan and his congressional allies are fighting to preserve the landmark Voting Rights Act as it was written in 1965 at the peak of liberal social reform.

The catch is that the Administration is fighting against civil rights lobbyists, who are trying to amend the law to make it the strong tool against voting rights discrimination that they say its original sponsors intended.

The dispute, scheduled to reach the Senate this spring, might strike many as a highly arcane legal joust, with both sides offering diverse interpretations of a brief amendment and its potential impact. But the debate features highly charged political rhetoric, with civil rights lobbyists arguing that the Administration wants to cripple the voting law and the Administration responding that civil rights lobbyists want to institute racial "quotas" to increase the number of black elected officials.

Whatever the result, Reagan seems certain to be dragged through another messy altercation over his commitment to minority groups. The quarrel has already overshadowed his basic support for the Voting Rights Act, which is generally considered the most successful and least controversial of the nation's civil rights laws. (*For a report on Reagan's civil rights record, see NJ, 3/27/82, p. 536.*)

At issue is a section of a bill passed overwhelmingly by the House last October that would require only discriminatory results, not the more stringent test of discriminatory intent, to prove a voting rights violation by local officials.

Civil rights lobbyists want to overturn a 1980 Supreme Court ruling that required the use of the intent standard, which they say is difficult to meet and inconsistent with the 1965 law. Instead, they want to require only a demonstration that an election practice resulted in a limitation of voting rights. The House Judiciary Committee said that would "restate Congress's earlier intent."

Whether to approve the House-passed language on the results test has become the dominant issue in the Senate Judiciary Committee. Orrin G. Hatch, R-Utah, chairman of the Senate Judiciary Subcommittee on the Constitution and the chief opponent of the House-passed change, said the dispute is "one of the most substantial constitutional issues" ever to face Congress.

Hatch has argued that the House measure, far from being color-blind, would unconstitutionally move the nation toward "a totally color-conscious society based on equality of result." Only by electing minority officials in proportion to their share of the population, he says, could electoral districts demonstrate that they had not discriminated.

Hatch is supported by William Bradford Reynolds, assistant attorney general for civil rights, who testified before the subcommittee that the proposed change "threatens to undermine a basic principle of our democratic system of government; namely, that no group . . . has a *right* to be represented on elected governmental bodies."

Hatch and Reynolds fear that the bill would make it much easier for civil rights groups to prove that local jurisdictions that employ at-large elections or other multi-member contests for legislative bodies—the case in more than half the nation's municipalities—would be violating federal law by making it more difficult for minorities to win seats. An at-large system places emphasis on majority strength, but voting by smaller units typically makes it easier for minority groups to elect their candidates.

Hatch says that under the House bill, elected councils and boards in many cities, such as Pittsburgh, Cincinnati and Wilmington, Del., might be invalidated even though there has been no evidence that their electoral systems are discriminatory. He has made this argument pointedly to his colleagues who represent those areas.

Supporters of the bill as passed by the House argue that Hatch has overstated the significance of the proposed change and has needlessly complicated the debate.

"The results test will not lead to a requirement of proportional representation or other dire results that have been predicted," said Dennis DeConcini of Arizona, senior Democrat on the Senate Subcommittee on the Constitution. He and others point out that the House-passed bill includes a disclaimer that the failure of minority groups to elect officials in a proportion equal to their share of the population does not "in and of itself" violate the law.

INTENT V. RESULTS

The House-passed amendment sought by civil rights proponents would change a section of the Voting Rights Act that attracted relatively little litigation or political debate before the Supreme Court decision in 1980. The provision, which is Section 2 of the voting law, basically restates the 15th Amendment guarantee barring any action to "deny or abridge" a citizen's right to vote on account of race.

Civil rights lobbyists say they have relied on the selection in an average of only three or four cases per year as a means of proving voting discrimination. "The cases were difficult, lengthy and costly," said Ralph G. Neas, executive director of the Leadership Conference on Civil Rights, in a Jan. 26 memorandum to his members. "Under such a tough standard, civil rights groups with limited financial and legal resources did not waste them on frivolous challenges."

Their lawyers and congressional supporters maintain that there was widespread agreement within the Justice Department and the federal court system that the test prescribed by the 1965 law required civil rights group to focus only on the results of a challenged voting law rather than its intent.

"Many of these discriminatory laws have been in effect since the turn of the century," said the House Judiciary Committee in its report on the bill last September. "Efforts to find a 'smoking gun' to establish racial discriminatory purpose or intent are not only futile but irrelevant to the consideration whether discrimination has resulted from such election practices."

The change civil rights lobbyists have proposed in the voting law adds language barring any election practice "which results in" a denial or abridgement of a voting right. Their action was precipitated by the Supreme Court decision in a case challenging the at-large election of the three-member city commission in Mobile, Ala., a city with a black population of roughly 35 per cent that has not elected a black commissioner since the current format was adopted in 1911.

Writing for the Court, which split, 6–3, Justice Potter Stewart held that because there were "no official obstacles" for black voters or candidates, the challengers had failed to meet the "discriminatory intent" test. "This right to equal participation in the electoral process does not protect any 'political group,' however defined, from electoral defeat," Stewart said.

Civil rights lawyers quote Justice Byron R. White's dissent that the ruling differs from earlier decisions requiring a broader review of a city's racial conditions to determine whether there has been a violation. But Hatch and Reynolds argue that the ruling is entirely consistent with the voting law and that the change approved by the House, rather than restoring the standard in effect before the Mobile case, would focus on election results, not the existence of discrimination.

"We are deeply concerned that this language will be construed . . . to require governmental units to present compelling justification for any voting system which does not lead to proportional representation, notwithstanding the lack of discriminatory intent," Reynolds told the Constitution Subcommittee on March 1.

The sponsors of the House bill reject that charge by pointing out that they added a disclaimer that states: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."

But Hatch cites the "in and of itself" provision as presenting a "smokescreen" that would be easy to penetrate with only one other example of alleged racial discrimination by a local jurisdiction operating an at-large election.

F. James Sensenbrenner Jr., R-Wis., who offered the disclaimer language during the House committee debate, said it is "irresponsble" for Hatch to argue that all at-large elections would be vulnerable to challenge under the new test. "We added the language to make crystal clear that a plaintiff must show that a discriminatory test had the effect of denying access," he said. He added that the issue attracted little controversy in the House because most Members considered it an effort to restore Congress' original interpretation of the law's meaning.

But Rep. Henry J. Hyde of Illinois, the senior Republican on the Judiciary Subcommittee on Civil and Constitutional Rights, told the Senate subcommittee that the House language does not restore the law to its meaning before the Mobile decision and "may well be the most far-reaching legislation every adopted by Congress." Hyde conceded in an interview that he cooperated in effort to draft the House-passed language. But he added that he and the subcommittee gave the issue little attention.

"I confess that I didn't give it the study that I should have," said Hyde. "But it was my judgment that those of us wanting a less restrictive law should . . . leave Section 2 for the Senate, where the Republicans are in charge."

Hyde rejected criticism voiced by Hatch and others that the House Judiciary Committee intentionally avoided the issue or intimidated potentially hostile witnesses. But he added that an "intimidating style of lobbying" against Members reluctant to be targeted as racist caused a very complex bill to be "merchandised in extraordinarily simplistic terms."

In addition to lobbying by its Washington members, the Leadership Conference on Civil Rights, a coalition of 163 members, has organized massive grass-roots support for the House-passed bill through groups such as organized labor, Common Cause and the American Bar Association.

BAILOUT

In the House, where the issue of intent versus results was all but ignored, the focus of debate was the so-called preclearance section of the 1965 law, which requires that 9 states and parts of 13 others submit proposed changes in their election laws and procedures to the Justice Department for its approval.

Because of the way the law is written, it is virtually impossible for many of these areas, especially in the South, to escape this requirement. This has riled some southern politicians and other conservative Republicans, who note that the percentage of blacks registered to vote in the South has increased dramatically since 1960 and is not considerably less than white voter registration.

Hyde focused committee debate on finding ways to make it easier for covered states and cities to "bail out" from the pre-clearance section, which was extended in 1970 and 1975 and expires on Aug. 6. He held lengthy negotiations with subcommittee chairman Don Edwards, D-Calif., that resulted in a series of tentative compromises that would have extended the reporting requirement until 1992 and permitted jurisdictions to escape coverage if they met a series of tests showing they had a clean record. But, according to Hyde, civil rights lobbyists successfully pressured Edwards and Judiciary Committee chairman Peter W. Rodino, Jr., D-N.J., to drop these compromises. (*For a report on the committee negotiations, see NJ, 8/1/81, p. 1367.*)

Instead, Rodino and Edwards got Sensenbrenner and Rep. Hamilton Fish, Jr., R-N.Y., to agree to a more narrow compromise that would extend the pre-clearance section permanently and, effective in 1984, permit a jurisdiction to bail out if it has eliminated discriminatory voting practices and has no court suit pending against it. But, for example, a state with an otherwise clean record could not escape coverage unless all of its counties were eligible to bail out.

Reagan's call on Nov. 6—one month after the House vote—for a "reasonable" bailout proposal has received little attention in the Senate Judiciary Committee, where Hatch has avoided the bailout thicket and instead focused almost exclusively on the House-passed provision setting a results test for violations covered by the permanent section of the law.

ELECTORAL QUOTAS?

Hatch faces an uphill road in challenging the standard, inasmuch as 65 Senators, including 26 Republicans, have cosponsored a bill (S. 1992) identical to the House-passed measure. The bill was filed by Sens. Charles McC. Mathias, Jr., R-Md., and Edward M. Kennedy, D-Mass.

Because of Republican political sensitivity on civil rights issues, Hatch has stressed that he favors extension of the basic voting rights law. When his subcommittee met on March 24 to consider the extension, its three Republican members—Hatch, Charles E. Grassley of Iowa and Strom Thurmond of South Carolina—endorsed a simple 10-year extension of the bail-out provision with no change in the law's Section 2.

Thurmond has not said when he will schedule the bill for the full committee, a situation that worries the measure's proponents. As the Aug. 6 expiration date draws closer, Thurmond will have more leverage to make changes.

But proponents have a major weapon of their own: the possibility of skirting the committee and taking the House-passed bill directly to the Senate floor. Senate Majority Leader Howard H. Baker, Jr., R-Tenn., tried this approach last December, but Thurmond and Hatch resisted. To avoid a possible logjam with budget legislation, civil rights groups hope that Baker, who is generally considered a civil rights moderate, will urge the committee to complete action on the bill by early May. Failing that, they will ask Baker to take the bill directly to the Senate floor.

When the bill does reach the Senate, the odds are that Hatch will emphasize the prospect of election quotas. For many years, civil rights groups have pointed to the paucity of black elected officials, especially in the South. The Atlanta-based Voter Education Project Inc. released in April 1981 the following summary of the percentage of state and local offices held by blacks compared with their share of the over-all population.

[In percent]

	Offices	Population
Alabama	7	23
Arkansas	4	14
Florida	2	12
Georgia	4	24
Louisiana	12	27
Mississippi	7	31
North Carolina	4	20
South Carolina	10	28
Tennessee	3	14
Texas	2	12
Virginia	6	17

A congressional aide involved in the debate said supporters of the House-passed bill will have to rebut the claim by Hatch and his allies that civil rights groups want to promote "racial politics." They will have to prove that they seek only to drop the Supreme Court's 1980 "intent" test and to return to the earlier standard.

Civil rights lobbyists and Senate aides have been seeking agreements that would accomplish this goal, preferably without changing the House-passed bill. Hatch said he, too, wants to find "middle ground' because the issue has caused "a lot of heat" for him.

So long as the struggle continues, however, Reagan and his GOP allies in Congress can expect their headaches on civil rights issues to become more severe.

JOINT CENTER FOR POLITICAL STUDIES, INC.,
Washington, D.C., March 9, 1982.

Hon. ORRIN HATCH,
Chairman, Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR HATCH: On the last day of hearings on the Voting Rights Act, Assistant Attorney General Reynolds made a statement about the issue of reviewability of non-objections. I am writing this letter in response to Mr. Reynolds' statement, and I request that this letter be included in the Hearing Record.

Mr. Reynolds claimed that if non-objections were subject to judicial review as suggested by Professor Cochran and others, the burden on the Department of Justice would be intolerable.

There is no evidence to support that view and Mr. Reynolds' statement should not be allowed to obscure the great need for an amendment to S. 1992 which would provide for limited judicial review of non-objections.

Judicial review of objections is available to covered jurisdictions (actually they are even better off, because they get a trial de novo), yet under the law as interpreted in *Morris* v. *Gressette*, 432 U.S. 491 (1977), the corresponding right is not available to the voters who were the intended beneficiaries of the Voting Rights Act. I am confident that you would agree that in simple fairness the right of judicial review should be mutual. The right of review for voters is crucial for several principal reasons:

1. In passing on voting change submissions, the Attorney General is exercising a quasi-judicial function, as the surrogate for the district court. Yet, while a decision by the Attorney General which is adverse to the jurisdiction may be reviewed all the way up to the Supreme Court, a decision by the Attorney General which is adverse to the voter ends there and there is no way to get a definitive answer. I am not aware of any comparable function within our government so subject to ordered principles and yet is unreviewable. In this connection, many of the questions to be dealt with by the Attorney General in reviewing submissions involve not only findings of fact but complex questions of law. For example, in several cases, the Attorney General has had to decide whether under section 5 he is to defer to a court ruling on the constitutionality of a particular voting change. (See the submissions if the post-1970 reapportionments of the Mississippi Congressional districts and the South Carolina Senate.) If the Attorney General had held that he would not defer to the court ruling (because that ruling was based on a wholly different standard) and then objected to the change in question, the states could have taken the cases to court, including the Supreme Court, for review, and a definitive answer would have been forthcoming while preserving the rights of all concerned. Indeed, as we know now, that would have been the correct decision.

Unfortunately, the Attorney General at the time held the opposite way, i.e., that he was obliged to defer to such court rulings upholding the connstitutionality of these reapportionment plans. This was error, but there was no way to seek review to find out, and the Supreme Court held that because the sixty-day submission period had passed, the legal question was beyond review by anyone. *Morris* v. *Gressette*, 432 U.S. 491 (1977). The specific consequence was that black voters in Mississippi and South Carolina have been deprived of their rights under the Act for a decade. That is a bizarre approach for a law that was designed to help minority voters, and I do not believe it is what Congress intends.

Another example is a question now involved in a number submissions, i.e., whether a current submitted redistricting plan should be compared to a 1964 baseline or to the last plan as adopted or to the last plan as it now operates. This question is an important one, which may have to be finally settled by a court. But the ironic answer is that it will be settled by a court only if the Attorney General rules against the submitting jurisdiction; if the Attorney General rules for the submitting jurisdiction and against minority voters who oppose it, it will never come to a court for review. That is a strange way to make the law.

2. Under the law as now applied, a covered change is precleared if the Attorney General fails to object within sixty days—for whatever reason. If he forgets, or if he is corrupt, or if the submission is lost behind the radiator, none of those makes any difference: the voters cannot get the benefit of an objection. Several of these examples have come to pass. There have been submissions that were simply not answered within sixty days; there was an instance where a

more-information request (the only thing that can toll the sixty days) sent within sixty days was mailed to an outdated address—and there is still litigation over that submission; and, sadly, there have been several instances where there are strong indications that a decision was based on politics rather than the merits.

Strong indications of politics affecting section 5 decisions have been involved in a number of submissions in earlier years. They have cropped up again in at least two instances last year: the withdrawal of the Jackson, Mississippi annexation objection, and the decision not to file a brief in *McCain* v. *Lybrand*, to enforce a prior section 5 objection. Newspaper articles contain strong suggestions of political influence, which have gone unanswered by the Justice Department; indeed, in the *McCain* case, the Assistant Attorney General refused to identify the source of the "information" that led to his sudden withdrawal of the brief—other than to say the source was not in the Justice Department or the White House.

3. It is true that Congress did not address the question of judicial review in 1965, and the Supreme Court in *Morris* v. *Gressette* held the statute does not provide for such review. But the legislative history of the 1965 Act shows that the reason for Congress' failure to address the issue was not that Congress wanted to preclude judicial review of section 5 changes, but rather than Congress thought there would in fact be judicial review. When section 5 was first proposed, the sole route for preclearance was judicial—by an action for a declaratory judgment. The administrative preclearance by the Attorney General was a method added as a safety valve during the hearings, when questions were raised about how trivial changes would be precleared. At that point, the Attorney General method was adopted with the expectation that it would be solely for trivial changes, and that the significant changes would be dealt with through court action. In short, it was presumed that the typical change would be considered by a court, and only the atypical, trivial change would be dealt with administratively.

Since the administrative method was expected to apply to only a few changes, and those only the insignificant ones, there was no need to specify judicial review in those cases; it was expected that any significant changes would already be subjected to court consideration. As we know, of course, most changes—even the complex ones—have gone through the administrative process. The proposed amendment providing for judicial review is thus appropriate and necessary to carry out the overall goals of the Voting Rights Act. (And the goals of the 1970 and 1975 Congresses—neither of which had to address the question because the *Morris* case was not decided until 1977, before which it was generally believed that there was a right of review).

4. Any fears about the right of review being unmanageable are more imaginary than real. First, the provision for a review should limit such review to cases that involve arbitrary action or errors of law, thus preventing routine attempts to overturn non-objections based simply on a voter's disagreement with the way the Attorney General looked at the facts. Secondly, there should be a short statute of limitations—perhaps 180 days. Third, the filing of a review case would not automatically stop enforcement of the change; the court would use ordinary equity powers and thus enter an injunction only when the likelihood of success was strong.

These standards were generally followed in the years before *Morris* v. *Gressette*, and they caused no disruption. Indeed, during those years, even when there was a general assumption that non-objections were probably reviewable, there were only four cases that I know of: *Harper* v. *Kleindienst*, *Perkins* v. *Kleindienst*, *Common Cause* v. *Mitchell*, and—indirectly—*Evers* v. *Williams*.

Related to the issue of reviewability of non-objections, is the need for an amendment that would restrict the Attorney General's authority to withdraw objections. Right now the Attorney General claims the right to withdraw objections at any time and for any reason, and he has in fact, in Jackson, Mississippi, withdrawn an objection five years after its entry. There is simply no excuse for this, because it leads to uncertainty in the law, and it invites Attorneys General to create chaos by simply changing all the prior decisions that they happen to disagree with.

I should note that although the Attorney General currently maintains a practice of withdrawing objections when he deems it appropriate, there is nothing in the statute that gives him the authority to do so. If the *Morris* v. *Gressette* case is followed, the Attorney General presumably loses all his authority after sixty days—certainly he could not lose it only for one side and not for the other. I do not see any harm in a limited right to request reconsideration, as long as it is restricted in the ways outlined below, but I believe the current practice is too open-ended.

Obviously there ought to be room to correct mistakes, or respond to changed circumstances, but there must be limits if we are to have a coherent legal system. An amendment should provide that the Attorney General may withdraw an objection only upon application made within a short period after the entry of the objection—say, thirty or sixty days, and then only upon the offering of new information or a strong showing that the law or the facts have changed. If the thirty or sixty day period goes by, the jurisdiction ought either to be remitted to a declaratory judgment action in the district court or, in limited appropriate cases, might be permitted to readopt the change and resubmit it. In any event, of course, the voters should keep the right to review any withdrawal of an objection—in line with the right of review discussed above.

Our experience with section 5 tells us that these proposals for amendments would insure a greater measure of rationality to the Attorney General's decisions by affording minority voters a limited right of judicial review of non-objection decisions, and by regulating closely the Attorney General's practice of reconsidering objections.

Sincerely,

ARMAND DERFNER.

ERRORS IN THE SENATE TESTIMONY OF ASSISTANT ATTORNEY GENERAL WILLIAM BRADFORD REYNOLDS IN HIS OPPOSITION TO THE HOUSE-PASSED BILL EXTENDING THE VOTING RIGHTS ACT

INTRODUCTION

On March 1, 1982, the Assistant Attorney General in charge of the Civil Rights Division, Mr. William Bradford Reynolds, made a number of misleading and incorrect statements during his Senate testimony against the House-passed bill extending and strengthening the Voting Rights Act. We wish to point these out, not only to show the emptiness of the Administration's position on the Voting Rights Act, but also to demonstrate the substantial justifications underlying the broad bipartisan support for S. 1992.

Essentially, the articulated position of Mr. Reynolds and the Administration is based on unrealistic predictions of ominous things to come should the Senate approve the version of Section 2 of the Act which passed the House by a vote of 389–24. Under the House-passed bill, Section 2 would ban those voting practices which result in a denial or abridgement of the right to vote because of race or language. The administration, by contrast, wants to outlaw only voting schemes which can be proven to have been enacted or maintained with racially discriminatory *intent*. The issue is of immense importance to the rights of all Americans, and should be decided on a realistic assessment of the merits, rather than on the basis of the inaccuracies which form the content of Mr. Reynolds' recent testimony before the Senate Subcommittee on the Constitution.

1. "VIGOROUS ENFORCEMENT"

What Mr. Reynolds said:

"This Administration is firmly committed to vigorous enforcement of the rights protected by Section 2." (Written Statement, p. 12).

The truth is:

Since this Administration took office, it has not filed a single new lawsuit to enforce rights protected by Section 2 of the Voting Rights Act, and it has withdrawn from participation (as amicus curiae) in one (*Rogers* v. *Lodge* in the Supreme Court). The sum total of its "vigorous enforcement" has been to join three lawsuits already filed by private plaintiffs as intervenor (*Bolden* v. *City of Mobile* on remand from the Supreme Court and *Sanchez* v. *King*) and amicus curiae (*Kirksey* v. *City of Jackson* in the Fifth Circuit).

2. THE LEGAL STANDARD BEFORE THE MOBILE DECISION

What Mr. Reynolds said:

"If you look at the principal cases both by the Supreme Court and the Fifth Circuit, the constitutional standard as announced in *Whitcomb* v. *Chavis* and

White v. *Regester*, which were the only two cases before *Mobile*, the constitutional standard does indeed embrace an intents test or a showing of a discriminatory purpose as an element of the constitutional violation." (Transcript, p. 52.)

The truth is:

There were more than two Supreme Court vote dilution cases before *Mobile*. The Supreme Court did not "embrace an intents test" in any of these cases. Furthermore, the principal cases decided by the Fifth Circuit Court of Appeals—which oversees the vast majority of vote dilution litigation in this country—did not require proof of discriminatory intent, but instead, followed a results analysis.

In two of the earliest Supreme Court cases decided after *Reynolds* v. *Sims*, the landmark reapportionment decision, the Supreme Court said that at-large voting which dilutes minority voting strength would be unconstitutional if minority voters could show that

> designedly or otherwise, a multi-member constituency scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.

Burns v. *Richardson*, 384 U.S. 73, 88 (1966); *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965) (emphasis added). The court discussed minority voters' burden to demonstrate an "invidious effect" and "invidious result" (384 U.S. at 88).

In neither *White* nor *Whitcomb* did the Court undertake a factual examination of the motivation behind those who designed the electoral districts at issue. As Circuit Judge John Minor Wisdom, a 25-year veteran of the Federal appellate bench, has correctly noted:

> In *White* v. *Regester* and *Whitcomb* v. *Chavis*, the leading cases involving multi-member districts, the Supreme Court did not require proof of a legislative intent to discriminate.

Nevett v. *Sides*, 571 F.2d 209, 232 (5th Cir. 1978) (concurring opinion).

In *Whitcomb* and *White* the court defined the burden of proof of minority voters in vote dilution cases, not in terms of proving a discriminatory intent, but rather

> to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

White v. *Regester*, 412 U.S. 755, 766 (1973); *Whitcomb* v. *Chavis*, 403 U.S. 124, 149–50 (1971).

None of the many Fifth Circuit cases which followed in the wake of *Whitcomb* and *White* required a showing of discriminatory intent to prevail on a claim of unlawful vote dilution. Included in the record of the hearings before the Senate Subcommittee on the Constitution is an analysis done by the Lawyers' Committee of nineteen Fifth Circuit vote dilution cases coming during the years 1972 to 1978 (See the Appendix to the statement of Frank R. Parker before the Subcommittee). These constitute most, if not all, of the Fifth Circuit's dilution decisions during that period, and, as the analysis specifically demonstrates, each of them employed a results standard rather than an intent test.

The principal Fifth Circuit case was the *en banc* decision in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd* on *other grounds*, 424 U.S. 636 (1977), and it obviously did not "embrace an intents test." *Zimmer* made it clear that a constitutional violation could be proven by a discriminatory purpose *or* a discriminatory result:

> "[T]o establish the existence of a constitutionally impermissible redistricting plan, plaintiffs must maintain the burden of showing either first, a racially motivated gerrymander, or a plan drawn along racial lines, *or* second, that '. . . *designedly or otherwise*, a[n] . . . apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.' "

485 F.2d at 1304 (emphasis added).

As the Lawyers' Committee analysis shows, the Fifth Circuit consistently followed *Zimmer's* results test for the next five years. Therefore, the Court could properly say in *Hendrix* v. *Joseph*, 559 F.2d 1265, 1269 (5th Cir.), *cert. denied*, 434 U.S. 970 (1977) that "motive is not a direct issue in the dilution context," and explain in *Paige* v. *Gray*, 538 F.2d 1108, 1110–1111 (5th Cir. 1976) that evaluation of dilution claims "should be made under . . . precedents [which] do not reach the question . . . of racial motivation."

In the *Mobile* decision itself, the plurality recognized that these prior cases did not require proof of discriminatory intent:

> [*Zimmer* v. *McKeithen*] was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause—that proof of a discriminatory effect is sufficient.

446 U.S. at 71.

The *Mobile* decision thus represents a radical departure from the prior legal standard applied both by the Supreme Court and the Fifth Circuit under which black and Hispanic voters had been successful in overcoming racial gerrymandering of district lines, discriminatory multi-member districts and at-large elections, and other discriminatory electoral barriers.

What Mr. Reynolds did not tell the Senate Subcommittee is that prior to the *Mobile* decision, the Justice Department (during the Carter Administration) filed two *White* v. *Regester* lawsuits challenging multi-member districts in the South Carolina Senate (*United States* v. *South Carolina*) and at-large municipal voting in Hattiesburg, Mississippi (*United States* v. *City of Hattiesburg*)—both of which were dropped within three months after the *Mobile* decision because of the difficulty of proving discriminatory intent. These actions show that the Justice Department itself recognized that the *Mobile* case drastically changed the law.

The House Report indicates that the purpose of this Section 2 amendment is simply to restore the legal standard followed in the cases prior to *Mobile*, which focuses on the results and consequences of a challenged voting law, rather than on the intent or motivation behind it.

3. "PROPORTIONAL REPRESENTATION"

What Mr. Reynolds said:

"By adopting a statistical test which measures the statutory validity of a voting practice or procedure against election 'results,' the House amendment would place in doubt the validity of any election system under which candidates backed by the minority community were not elected in numbers equal to the group's proportion of the total population." (Written Statement, p. 14.)

The truth is: These proportional representation claims are made out of whole cloth. There is nothing in the language of S. 1992, the House Report, or the speeches of the various supporting witnesses and members of Congress to lead to the conclusion that quotas in election results are the goal of the House-passed bill. Indeed, the plain words of the amendment specifically disclaim proportional representation. The second sentence of Section 2 of S. 1992 reads: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of the Section." As the Washington Post correctly editorialized, "The drafters of the House bill went to some trouble to avoid this misapprehension [that Section 2 would require proportional representation]" (*The Washington Post*, December 20, 1981).

4. THE EXISTENCE OF A TRACK RECORD REGARDING THE RESULTS TEST AND PROPORTIONAL REPRESENTATION

What Mr. Reynolds said:

"Senator MATHIAS. . . . [Y]ou said that we had no experience as to how the court would react under an 'effect' test. But is it not true that we do have a track record on which to rely for the amended Section 2? There is, in fact, a track record of a lot of Court of Appeals decisions that did adopt the 'result' test, that did look to all the circumstances, *that did reject proportional representation*, and I would submit that this track record does exist and that the Congress can rely upon it with a great deal of confidence.

"Mr. REYNOLDS. Well, with all due respect, Senator, you are absolutely wrong . . . The cases that I suspect that you have reference to, all are cases that came out of White versus Regester mold, largely in the Fifth Circuit. Those cases do incorporate and include an element of the violation that there has to be a showing of discriminatory intent." (Transcript, pp. 72–73) (Emphasis added).

The truth is:

There is an extensive Fifth Circuit track record under the results test, and it specifically repudiates in word and practice the notion of proportional representation. As previously noted, the Lawyers' Committee analysis presented at the Subcommittee hearings shows that the Fifth Circuit consistently applied a results standard to vote dilution cases from 1972 to 1978. None of the nineteen cases summarized in that analysis required proportional representation and, as the summaries specifically demonstrate, all but two explicitly repudiated the concept of proportional representation. For example, the Court noted in *Zimmer* that "[c]learly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives." 485 F.2d at 1305. And in *Paige* v. *Gray*, the Court's articulation of a results analysis was accompanied by the statement that "the plaintiff must show more than a mere disparity between percentage of minority residents and percentage of minority representation." 538 F.2d at 1111.

Thus, contrary to Mr. Reynolds' representation, we clearly do have an extensive track record which shows that the results test *in no way* leads to proportional representation. Indeed, th results test specifically repudiates the concept of proportional representation.

5. FEDERAL COURT "RESTRUCTURING" OF ELECTION SYSTEMS

What Mr. Reynolds said:

"But in the archetypal case—where minority-backed candidates unsuccessfully seek office under electoral systems, such as at-large systems, that have not been neatly designed to produce proportional representation—disproportionate electoral results would lead to invalidation of the system under Section 2, and, and, in turn, to a federal court order restructuring the challenged governmental system. Such restructuring would by no means be limited to southern cities. . . . Would the multi-member districts in Pittsburgh, Pennsylvania or Hartford, Connecticut be vulnerable to a restructuring federal court suit under Section 2? A brief look at the statistics would lead to the conclusion of minority underrepresentation in those cities, as well as Wilmington, Delaware and Kansas City, Kansas and many others. Yet no evidence has been presented suggesting racial discrimination in the electoral system of those cities." (Written Statement p. 16).

"Mr. REYNOLDS. We have done a rough survey to see exactly what the impact might be with regard to an effects test and certainly in the areas that were mentioned in my testimony, Pittsburgh, Pennsylvania, and you have an at-large system where you have 24 percent of the population in Pittsburgh that is minority and they have only one black out of nine on the city council.

"Without trying to suggest that there are any discriminatory motives at all, and I do not suspect there are, to the effects test that would be vulnerable to attack. You can go down——

"Senator HATCH. How about Hartford, Connecticut?

"Mr. REYNOLDS. Hartford, Connecticut would have the same problem. Wilmington, Delaware; Dover, Delaware, would have the same problem. Fort Lauderdale——

"Senator HATCH. How about Boston?

"Mr. REYNOLDS. Boston, Massachusetts, would definitely have underrepresentation. Springfield, Massachusetts; Baltimore, Maryland, would have underrepresentation. Kansas City, Kansas, South Bend, Indiana——

"Senator HATCH. How about Cincinnati?

"Mr. REYNOLDS. Cincinnati and Dayton, Ohio, would be. Paterson, New Jersey, Chester, Pennsylvania, Memphis, Tennessee——" (Transcript, pp. 57–58.)

The truth is: This is another example of the "scare tactics" and obfuscation employed by opponents of the Section 2 amendment in totally misconstruing and distorting what would happen if the Section 2 amendment became law.

Section 2, since it restores the *White* v. *Regester* standard applied by the courts before the *Mobile* decision, requires much more than mere "disproportionate election results" and "minority underrepresentation" to prove a violation. Minority voters would have to prove that election systems such at at-large voting actually deny minority voters equal access to the political process.

What Mr. Reynolds did not tell the Senate is that in 1978 the Civil Rights Division of the Justice Department conducted a survey of northern and western cities to explore the possibility of targeting jurisdictions for vote dilution investigations under the *White* v. *Regester* standard, which the Section 2 amendment is designed to restore. No voting rights lawsuits were filed by the Civil Rights Division as a result of that survey. Although the cities listed in Mr. Reynolds' testimony were included in that survey, only Cincinnati was the subject of an actual vote dilution investigation, and the Civil Rights Division did not discover the facts necessary to institute a lawsuit under the *White* v. *Regester* standard.

Thus, the experience of the Justice Department shows that cities such as Cincinnati, Ohio will not be vulnerable to a vote dilution lawsuit under the Section 2 results standard simply because of a disproportion in the number of minority elected officials.

6. HARTFORD, CONNECTICUT

What Mr. Reynolds said:

"Senator LEAHY. Mr. Reynolds, you say on page 15 of your prepared statement that a brief look at the statistics would lead to the conclusion . . . that minority under-representation in Northern cities like Hartford, Connecticut, might result in restructuring by Federal courts. Is that a basic fair restatement of your position on page 16?

"Mr. REYNOLDS. That is what it says, yes.

"Senator LEAHY. I understand that Hartford has a black mayor, a black deputy mayor, one-third of the nine-member city council is minority comprising two blacks and one Hispanic. Under the tests of *White* v. *Regester* and *Zimmer* v. *McKeithen*, which are revised, what possible basis could anyone find for restructuring anything in Hartford?

"Mr. REYNOLDS. I believe you are looking at—your information is based on outdated figures in Hartford and that is not what the situation is.

"Senator LEAHY. What is the situation in Hartford today? Do they have a black mayor?

"Mr. REYNOLDS. A black mayor—an at-large system with nine members of the city council. One is black and one is Hispanic in a jurisdiction that has 33 percent black population and 20 percent Hispanic. Total minority of some 55 percent.

"Senator LEAHY. So am I wrong in stating that Hartford has a black mayor, a black deputy mayor, one-third of the city council is minority, two blacks and one Hispanic? Are those facts wrong?

"Mr. REYNOLDS. My information is that there is only one black and one Hispanic and that the percentage is 22 percent on the city council out of 55 percent total minority population.

"Senator LEAHY. So there is not a black mayor, a black deputy mayor and one-third of the nine-member city council that is minority, two blacks and one Hispanic?

"Mr. REYNOLDS. That is not the information I have, Senator." (Transcript, pp. 114–116.)

The truth is: The City of Hartford, Connecticut is governed by a black mayor and a nine-person city council which includes three minority members—two blacks and one Hispanic. One of the black council members is also the deputy mayor of Hartford. The mayor is not a member of the city council.

7. PROVING DISCRIMINATORY INTENT

What Mr. Reynolds said:

"The difficulty of proving discriminatory intent is often cited in support of the discriminatory effects standard proposed by the House. Frequently voiced by witnesses before this Subcommittee and by the authors of the House Report is the review that the Supreme Court has required evidence of the so-called 'smoking gun' to prove purposeful voting discrimination. The Court has done no such thing.

"To the contrary, in numerous cases it has made abundantly clear that '[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such *circumstantial and direct evidence* of intent *as may be* available.' *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 266–68 (1977). Indeed, the discriminatory effect of official action can alone be sufficient to prove an intent to discriminate when the action is unexplainable on any other basis, as was the case in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). Other indicia of discriminatory intent recognized by the Court are (1) the historical background of the challenged decision, particularly if it reveals a series of official actions taken for invidious purposes, (2) the degree to which the action departs from either the normal procedural sequence or normal substantive criteria, and (3) contemporaneous statements of members of the decisionmaking body, minutes of its meetings, reports, or other direct evidence of intent." (Written Statement, pp. 19–20.)

The truth is: Mr. Reynolds has been telling the Senate one thing, and the Supreme Court another. In actual practice, Mr. Reynolds and the Justice Department do not ascribe to the view that circumstantial evidence is sufficient to prove discriminatory intent, and instead, insist that nothing less than a "smoking gun" will prove intentional racial discrimination.

In *Seattle School District No. 1* v. *State of Washington*, the District Court found a state anti-busing referendum (Initiative 350) unconstitutional for discriminatory intent, and relied upon the same *Arlington Heights* criteria cited by Mr. Reynolds in his testimony. 473 F. Supp. 996 (D. Wash. 1979), *aff'd on other grounds*, 633 F. 2d 1338 (9th Cir. 1908), *probable jurisdiction noted*, 50 U.S.L.W. 3278 (No. 81–9, Oct. 13, 1981). In the Court of Appeals, the Justice Department sided with the plaintiffs; but in the Supreme Court the Justice Department reversed its position and sided with the defendants.

In his brief before the Supreme Court in the *Seattle* case, Mr. Reynolds contends that these *Arlington Heights* criteria do not in fact prove discriminatory intent:

> Upon examination, however, the factors set forth in *Arlington Heights* do not support the conclusions that Initiative 350 is animated by an invidious intent. (Brief for the United States, p. 37.)

In addition, Mr. Reynolds' brief makes the following points:

The discriminatory impact of the law is not sufficient to invalidate it, and discriminatory impact "is a reliable indication of discriminatory intent only when it is shown that the impact was not only anticipated but desired . . ." (Brief pp. 38–39). "Thus, the 'impact' noted by the district court is not probative of discriminatory intent." (Brief, p. 40.)

The historical background and sequence of events—the fact that the voters of the state adopted the Initiative in reaction to a public school desegregation plan—"does not evidence invidious discrimination." (Brief, p. 41.)

"The final indicator of discriminatory intent noted by the district court—that Initiative 350 constituted a 'marked departure from the procedural norm' (J.S. App. A–35) because state educational policy supplanted local policy—has almost no probative weight as evidence of racial animus." (Brief, p. 41.)

The indirect evidence of intent in the *Seattle School District* case is quite strong. Indeed, no clear case could be presented of an aggregate of circumstantial evidence proving racially discriminatory intent, yet the Justice Department now says that the proof was insufficient.

Mr. Reynolds makes similar arguments—that circumstantial evidence is not sufficient to prove discriminatory intent—in his brief filed before the Supreme Court in *Crawford* v. *Board of Education of City of Los Angeles* (U.S. Sup. Ct., No. 81–38). Brief for the United States as Amicus Curiae, pp. 23–30.

In a voting rights case which was argued in the Supreme Court in February, *Rogers* v. *Lodge* No. (80–2100), both the District Court and the Court of Appeals inferred from circumstantial evidence that at-large elections in Burke County, Georgia—a county with a long record of racial discrimination against blacks—were being maintained for a discriminatory purpose. See *Lodge* v. *Buxton*, 639 F.2d 1358 (5th Cir. 1981). In the Court of Appeals, the Justice Department filed a brief on behalf of plaintiffs; in the Supreme Court, Mr. Reynolds decided against filing any brief. On the television program *Nightline*, Mr. Reynolds expressed the opinion that at-large elections in Burke County do not violate the law.

Finally, what Mr. Reynolds neglected to tell the Senate Subcommittee is that in all these "numerous cases" since the *Arlington Heights* decision—and in the *Arlington Heights* case itself—the minority plaintiffs lost and the Supreme Court held that the circumstantial evidence contained in the record was not sufficient to prove discriminatory intent.[1]

It appears that the Justice Department and Mr. Reynolds are trying to tell the Senate one thing—that intent is easy to prove—so that the Senate will unwittingly reject S. 1992 and thereby burden racial minorities. Then, in actual practice, the Justice Department and Mr. Reynolds turn around and tell the courts something else—that intent can only be proved by "smoking gun" evidence—with the result that racial minorities suffer. Thus, the only thing consistent about the position of the Justice Department is the immense new burden it seeks to impose on the minority citizens of this country.

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[1] See *Washington* v. *Davis*, 426 U.S. 229 (1976) ; *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979) ; *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980) ; *City of Memphis* v. *Greene*, 49 U.S.L.W. 4389 (1981).

8. FORESEEABILITY AS PROVING DISCRIMINATORY INTENT

What Mr. Reynolds said:

"Senator SPECTER. . . . On the issue of intent, I am troubled by the language of Justice Stewart in Footnote 17, and I would like to know whether or not you think this is a legal standard that has to be proved, where he says, "Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group."

"If you were dealing with intent in the traditional setting, natural and probable causes of a person's act it may be one thing to draw an inference of intent but does not that standard, if applied, put a very much higher burden of proof on a plaintiff in a voting rights case?

Mr. REYNOLDS. I do not believe it does in the context that you asked me the question. I think what Justice Stewart was saying is that you, in order to show intent, you have to meet the standard of purpose that the Constitution requires and is articulated in the *Feeney* case and also *Washington* v. *Davis*. But he also makes it clear that you can do that through circumstantial evidence and indirect proof as well as through direct evidence." (Transcript, pp. 89–90.)

The truth is: The *Mobile* decision does put a very much higher burden of proof on plaintiffs in voting rights cases than in any other area of the law.

In other legal areas where proof of intent is required, courts may presume that the defendant has intended the natural and foreseeable consequences of his or her acts. Noted trial lawyer and evidence expert Irving Younger, in his testimony arguing that an intent test is neither unusual nor difficult to apply, stated as one of the "rules of thumb" regularly followed by courts and juries: "X will be deemed to have intended the direct and natural consequences of his acts" (Younger Statement, p. 5). In the Northern school segregation cases, in which minorities must prove intentional discrimination, the Supreme Court has held evidence of foreseeable impact to be relevant—"Actions having foreseeable and anticipated disparate impact are relevant evidence" (*Columbus Board of Education* v. *Penick*, 443 U.S. 449, 463–65 (1979)); "proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose" (*Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 536 n. 9 (1979)).

However, as Senator Specter pointed out, the Supreme Court in footnote 17 of the *Mobile* decision appears to have ruled out this kind of evidence for proving discriminatory intent in voting cases:

> [I]f the District Court meant that the state legislature may be presumed to have "intended" that there would be no Negro Commissioners, simply because that was a foreseeable consequence of at-large voting, it applied an incorrect legal standard.

446 U.S. at 72 n. 17. Minority voters have the extremely difficult burden of proving that a discriminatory voting scheme was adopted "because of" not merely "in spite of" its discriminatory impact. This standard rules out much of the circumstantial evidence and indirect proof that is relevant and probative in other kinds of intent cases, and implies that nothing less than a "smoking gun" will be sufficient.

9. PROVING A DISCRIMINATORY RESULT

What Mr. Reynolds said:

"Senator HATCH. Well, you have indicated that the lack of proportional representation plus one other factor triggers Section 2. The way I read these cases, the House Report which states the lack of proportional representation is really relevant evidence of a violation identifies just a few. Let me add just a few others: registration, a discriminatory culture, money for black education facilities, economic difficulties in registering, candidate rates, bloc voting, a history of English only, poll taxes, maldistribution of services city council decision-making, staggered terms, multi-member districts, annexations, numbered posts, dual school systems, neighborhood patterns, impediments to third parties, majority [vote requirement], off-year elections, residential requirements, reapportionment, redistricting, absentee ballot irregularities, preclearance, I could go on and on and on. These are all cases that found these to be factors that you would consider.

"So lack of proportional representation plus any of those factors triggers Section 2.

"Mr. Reynolds. I think that is right and it would mean that the discriminatory provision would not be a basis to take you outside of Section 2." (Transcript, pp. 101–102)

The truth is: The proposed Section 2 amendment is designed to restore the legal standard in effect before the *Mobile* decision. Under this prior standard, minority voters were required to prove that the challenged voting law denied them equal access to the political process based upon the existence of a number of criteria:

> The fact of dilution is established upon proof of the existence of *an aggregate of these factors.*

Zimmer v. *McKeithen*, 485 F.2d at 1305 (emphasis added). As the Lawyers' Committee analysis of Fifth Circuit cases specifically points out, the numerous court decisions under this standard required much more than merely a scintilla of additional evidence. Minority voters lost when they were able to prove only three of four of these factors. See, e.g., *McGill* v. *Gadsden County Commission*, 535 F. 2d 277 (5th Cir. 1976) (only for *Zimmer* factors proven); *David* v. *Garrison*, 553 F.2d 926 (5th Cir. 1977) (no proof of denial of equal access). Explicit finding on these criteria were required. For example, in *Hendrix* v. *Joseph*, 559 F.2d 1265 (5th Cir), *cert. denied*, 434 U.S. 970 (1977), the Fifth Circuit reversed a District Court decision striking down at-large elections in Montgomery County, Alabama, because the District Court failed to find the existence of an aggregate of discriminatory factors:

> Before [declaring an at-large system unconstitutional], thorough and detailed findings on each issue that the courts have thus far found to be relevant must be made. To allow conclusory findings that "the government is unresponsive," and that "no black has ever been elected," to substitute for such detail would alter the balance that our constitutional system of federalism is designed to protect.

559 F.2d at 1271.

10. CALLING BACK THE JUSTICE DEPARTMENT BRIEF IN M'CAIN V. LYBRAND

What Mr. Reynolds said:

"Senator Leahy. I would like to go back. You said in answer to Senator Specter's last question, I believe it was the decision of *McClain* v. *Lybrand*, you suggested you would like to read it. I understand your testimony to be you are not familiar with that case.

"Is that right?

"Mr. Reynolds. I am just generally familiar with it. I am not familiar with the record in the case.

"Senator Leahy. Yet you did feel you were familiar enough to call back the Government's brief which was already in the U.S. Attorney's office in South Carolina?

"Is that correct?

"Mr. Reynolds. No.

"Senator Leahy. You did not call, in *McClain* v. *Lybrand* case, you did not call back the Government's brief?

"Mr. Reynolds. No, sir, not in that case.

"Senator Leahy. Did you call back a brief in a case with similar facts as those in *McCain* v. *Lybrand?*

"Mr. Reynolds. No, sir.

* * * * * * *

"Senator Leahy. Entirely different litigation? That had absolutely nothing to do with *McClain* v. *Lybrand?*

"Mr. Reynolds. That is correct." (Transcript, pp. 106–107.)

* * * * * * *

"Senator Leahy. Why did you take the brief back?

"Mr. Reynolds. I made the decision that the issues were well briefed and argued by the parties in the case and that there was nothing we could add to it and therefore it was not something that suggested to me that it warranted our amicus participation.

"Senator **Leahy**. Did you tell somebody from the New York Times that you were asked to withdraw it?

"Mr. **Renolds**. No, I never said I was asked to withdraw it.

"Senator **Leahy**. Did you ever tell the New York Times——

"Mr. **Reynolds**. I was never asked to withdraw it.

"Senator **Leahy**. Did you tell the New York Times that you received last minute input from a source you did not care to disclose to them and that that affected your thinking in withdrawing the brief?

"Mr. **Reynolds**. I said that I received information that suggested to me that the matter was being fully briefed and covered by the parties and therefore we could not add anything to it.

"Senator **Leahy**. What was the source you would not disclose to the New York Times?

"Mr. **Reynolds**. Well, that was again information that I received——

"Senator **Leahy**. But that was the source you would not disclose to The New York Times?

"Mr. **Reynolds**. That the information that the brief was being handled—the issue had been briefed and was handled before the——

"Senator **Leahy**. What was the source you would not disclose to The New York Times, not the result of what that source said or what your conclusion was from it?

"Mr. **Reynolds**. That was the source, that was the information.

"Senator **Leahy**. What was the source, not the information? Who was the person?

"Mr. **Reynolds**. Well, at this juncture I am not at liberty to tell you the person.

"Senator **Leahy**. Why not?

"Mr. **Reynolds**. Because that relates to an internal matter within the Division." (Transcript, pp. 109–110.)

The truth is:

Mr. Reynolds' testimony is wrong.

In *McCain* v. *Lybrand*, Civil Action No. 74–281 (D.S.C.), a challenge to at-large elections in Edgefield County, South Carolina—where Senator Strom Thurmond was born, reared, and began his political career—Mr. Reynolds approved and signed an *amicus curiae* brief supporting black voters' claims of Voting Rights Act violations. Then, within 24 hours—just before the case was scheduled for oral argument before a three-judge District Court—Mr. Reynolds reversed his position and called back the brief—which had been sent to the United States Attorney's office for filing. A spokesperson for Senator Thurmond admitted that the Senator had discussed the case with Justice Department officials, including Reynolds, before the decision to retrieve the brief, but denied that Senator Thurmond applied "any pressure on the Justice Department." (*Richmond Times-Dispatch*, Sept. 18, 1981—New York Times Service story.)

This was the same case commenced by private plaintiffs in 1974 challenging at-large elections as unconstitutional. On April 17, 1980, the District Court found that the black voter plaintiffs had proved, under the *White* v. *Register* standard, that "the election process is not equally open to participation by the minority group" (slip opinion, p. 17). Then, after *City of Mobile* v. *Bolden* was decided, the District Court vacated its prior order because of the change in the law:

> Since circumstances have changed since the evidence was originally taken in this case the parties may wish to submit additional evidence on the point that is now the crux of the case—whether the at-large system was conceived or operated as a purposeful device to further racial discrimination.

Order of August 11, 1980, p. 3.

Subsequently, the plaintiffs discovered that the change from appointed county officials to at-large elections had not been precleared as required by Section 5 of the Voting Rights Act. In February, 1979, the Justice Department had objected to the new Home Rule governmental system under which the county council was elected in at-large voting. The 1981 hearing—in which Mr. Reynolds at first decided to participate and then changed his mind after discussions with Senator Thurmond—was scheduled on palintiffs' motion to enforce Section 5 of the Voting Rights Act.

The Justice Department's Section 5 objection to this change and the fact that a private Section 5 enforcement action was filed against Edgefield County are both noted in Attachment D–2 to Mr. Reynolds' testimony (p. 73).

PART 4. NEWSPAPER ARTICLES

[From Barron's, Jan. 25, 1982]

UNCIVIL ACT—THE VOTING RIGHTS BILL IS FRAUGHT WITH MISCHIEF

(By Peter Brimelow)

Sitting on the edge of his seat, obediently bobbing up and down at the behest of a roomful of electronic journalists and their moody microphones, the bulbous Sen. Charles Mathias of Maryland looked a little like the Goodyear blimp tugging at its mooring mast on a windy day. He was in odd company for a Republican on Jan. 20, the anniversary of Ronald Reagan's first inaugural address, which, in answer to a question, he refused to say was a cause for celebration. But he shared the same prim look of righteous indignation as Senator Kennedy and an assortment of professional liberals sitting at his side, including the NAACP's Benjamin Hooks, whose melodious imputation racism to a Republican President, Attorney General and/or fellow Senator went equally unchallenged.

The occasion: a press conference called to denounce the postponement for one week of hearings on S. 1992, the Voting Rights Act Extension bill, of which Mathias is the leading Republican sponsor. The total delay thus inflicted on the measure's legislative timetable: nil

Supporters of S. 1992 become hysterical at the slightest hint of prolonged debate for a simple reason, it is the same reason as causes them, when prodded, to try to intimidate questioners by evoking the heroic age of civil rights in the 1960s, citing a myriad of establishment supporters, pointing to the lopsided House approval of the identical measure during a lull in the economic wars of 1980, and brandishing the list of Senators co-sponsoring Mathias' bill (some of whom have had second thoughts).

S. 1992 cannot bear scrutiny because it is not merely an extension, but an expansion, of the original 1965 Act. It would profoundly affect not only former Jim Crow areas, but also the entire country. Although Hooks testified in House hearings last year that all he wanted was to prevent the semi-automatic release from Justice Department's oversight that was established in the 1965 Act for communities managing 17 years without discriminatory voting practices, it is now clear that civil-rights politicians have seized another opportunity to carve out racial perequisities, just as the 1964 Civil Rights Act's antidiscrimination provisions have been perverted into a requirement for minority quotas. This is a dagger pointed at the heart of America. Congress' response has been a sordid compound of fatuousness, fear and lack of moral fiber.

* * * * * * *

The 1965 Voting Rights Act was a brutal measure that should never have been necessary in a free society. The theory behind it was that the denial of access to the polls in certain Southern states was so endemic and vicious as to be irremediable by piecemeal litigation. It requiredd the presumption of guilt, and direct federal intervention. In its aim of increasing black voter registration, the act was immediately and triumphantly successful. But its methods were necessarily crude. For example, it affected all areas with voter turnouts below 50 percent, which is how impeccably nondiscriminatory communities in New York State come to be included. And this presaged a change of focus, as judges and bureaucrats ceased to concern themselves with the fact of discrimination and entered the more debatable area of its alleged results.

Communities "covered" by the VRA could alter their structure of government only if the Justice Department decided that the effect would not be to discriminate against minorities who now had the vote. Thus, in 1980, Rome, Ga., was prevented by the Supreme Court from making what was acknowledged to be an innocent change on the grounds that it would coincidentally make it more difficult to elect blacks.

But simultaneously, the Court refused to strike down a similar structure in Mobile, Ala. Because the Mobile structure pre-dated black enfranchisement, and did not reflect a post-1965 change, it could be challenged only on the Constitutional grounds of the 15th Amendment's ban on denial or abridgement of the franchise on the grounds of race. And the Supreme Court ruled that merely because blacks were not elected to the Mobile city commission in proportion to their population share—the "effect"—did not mean its electoral structure was discriminatory. If the law was neutral on its face, the Court said, to overthrow it would require proof of discriminatory "intent."

Supporters of S. 1992 dislike the Supreme Court's view of the Constitution. So they plan to reverse it by statutory means—with fine irony, by the way, since most claim that Senator Jesse Helms' similar strategy with respect to abortion is unconstitutional. Section 2 of S. 1992 would allow a suit to be brought anywhere in the country to suppress all political arrangements that have the "effect" of discrimination. The essential "effect" test: does the arrangement produce minority representation in proportion to minority numbers in the population at large?

Opponents argue that this will inexorably create a system of proportional representation. But minority representation will be not only proportional but guaranteed, as in the Parliament of Rhodesia/Zimbabwe, at the expense of the majority. This was made clear in *United Jewish Organizations vs. Carey*. The Justice Department would not believe that a proposed district in Brooklyn with a 61% nonwhite majority would elect a nonwhite Representative, because nonwhites were expected to have a lower propensity to vote. Redrawing the boundaries entailed dividing a community of Hasidic Jews, who sued to retain "their" seat. Not being black, American Indian, Asian, Alaskan or Hispanic, but merely white, they were not explicitly protected under the Voting Rights Act. So they lost. The new district, however, preferred the Founding Fathers' theory of representation to that of the Justice Department. It elected Frederick W. Richmond, who, is indisputably white.

The political consequences of S. 1992 could be devastating. At minimum, it will remove from the Republicans one of the traditional fruits of American electoral office: robust redistricting—"gerrymandering" after all, it is an American invention. Unfortunately for the Republicans, this will now incur the wrath of Justice Department bureaucrats, if the diluted Democrats turn out to be minorities, as they tend to be. Weakening whites, however, is still okay.

More significantly, S. 1992 is one in a series of steps in the last few years tending to exacerbate and institutionalize racial division. Under the system it proposes, it is advantageous and perhaps necessary for every American to cleave to some organized faction—just the eventuality the Constitution sought to prevent. To make matters worse, legislators elected by homogeneous constituencies would have less and less aptitude or taste for compromise. Politics would degenerate into a rerun of *West Side Story*.

The truth is that what was once a civil-rights movement has increasingly become a drive for civil privileges. To choose an "effects" rather than an "intent" test, in affirmative action, fair housing or voting rights, is to invest the state on its behalf with the right of endless and infinite social engineering.

Supporters of S. 1992 argue that the intent standard is difficult to prove. Senate opponents plan to produce Irving Younger, one of the country's leading trial lawyers, to argue that it is not. Intent is routinely proved in civil and criminal cases without the confession/"smoking gun"-type evidence that discrimination cases are sometimes said to require. In any case, since when was the law supposed to make things easier for the prosecution at the expense of justice?

Those who support S. 1992 know that the proportional-representation argument is a threat to them. Mathias completely evaded the issue in his Dec. 16 speech introducing the bill, presenting Section 2 merely as a technicality made necessary by the Supreme Court's failure to be "clear," i.e., agree with him. Cornered at the press conference, he fell back on the bill's concession that disportionate representation will not "in and of itself" be evidence of discrimination.

This is just not good enough. The *Weber* decision showed that judges will literally invert the meaning of a statute under the pressure of racial dogma. The vague additional evidence required in S. 1992—a pattern of bloc voting, for example, which could be posited anywhere—will be no problem.

Already some civil-rights politicians, notably Jesse Jackson last fall in Columbia, S.C., frankly asserted that proportionality is their goal.

Senator Mathias will be 60 this year. He has devoted his long career to the liberal cause within Republican ranks, and has met with utter failure. He is not now likely to change his perception of his civil-rights allies, or give up the comforting if illusory sensation of being part of a heavenly (and conquering) host. His own racially divided state will be so hard-hit by litigation if S. 1992 passes that it will practically forfeit self-government. Arguably no great loss. But Mathias, like most elected federal officials, might well calculate that he at least should be able to avoid trouble. Anyway, his seat isn't up until 1986.

And there is an uglier side to the voting-rights debate. It emerges in testimony prepared by NAACP's Hooks for the Jan. 20 hearings. The intents test, it reads, "is oftimes a code word for allowing discrimination to continue, even when the discrimination is there for everyone to see." At the press conference, he left a sly vagueness about his charge of racism as a result of the hearing's postponement: "There has to be a racist around somewhere."

No accusation of witchcraft in Salem ever had the impact that an accusation of racism has on America's current lawmakers.

Others, too: according to opponents of the bill, the leading academic expert on voting rights, Harvard's Abigail M. Thernstrom, has been dissuaded from testifying against S. 1992 by civil-rights politicians' threats to withhold co-operation on her forthcoming book.

* * * * * * *

The Voting Rights Act Extension Bill is unedifying whichever way you look at it. The "bail-out" provisions are so onerous that there is virtually no possibility any Southern area can independently qualify to escape this second Reconstruction. The bill's coverage of Hispanics, sweepingly defined, materially promotes the emergence of a second Quebec. Times have changed since 1965, and the best solution probably would have been to let the act run its course, prosecuting any subsequent offenders in the usual way. But above all, the dagger-point must be broken. The effects test must be defeated.

[From Human Events, May 12, 1979]

BILINGUAL BALLOTS SOAK TAXPAYERS, EMBARRASS MINORITIES

(By Ronald J. Berkhimer)

It will probably come as a surprise to most Americans to learn that one does not have to be able to speak and understand English to be a citizen. To become a citizen, yes. The application for naturalization reads, "You will be examined on your ability to read, write and speak simple English."

But if one is born a U.S. citizen, there is no such requirement. It would be natural to assume that, regardless of the language spoken in one's home, exposure to the public schools from age five to 18 would be sufficient to establish a working knowledge of English. The federal government even appropriates $400 million annually to help local jurisdictions with the problem. However there are indications that the programs are oriented more toward maintaining children's ethnic language than improving their English.

All this would be of little consequence if it had not been for the selective mandating of bilingual voting by the 1975 renewal of the Voting Rights Act.

The avowed purpose of the original act of 1965 was to assure the voting rights of black citizens who had been kept from the polls by lack of understanding of English caused by racial discrimination in schools. It brought under federal jurisdiction the voting in any state which required literacy as a qualification for voting, and in which less than 50 per cent of the voting age citizens had voted in the last presidential election. An immediate result of the act was the discontinuance of all literacy tests as a requisite for voting.

Legislators from Southern States bitterly opposed the act on the ground that it was discriminatory since it applied almost exclusively to their states. However, when the act came up for renewal in 1975, all they had succeeded in changing was to get it greatly broadened in scope. The revised act also provided that in any county where 5 per cent or more of the population were of American Indian, Alaskan Native, Asian American or Spanish heritage, election materials and ballots had to be provided in their ethnic language.

In 1976, the Justice Department found that no less than 29 states had at least one county falling within the jurisdiction of the act, and is enforcing it to the extent of sending 150 inspectors to the County of San Francisco to check compliance there in the last election.

Perhaps in sympathy, the State of California got into the act back in 1975 with the passage of the requirement that language assistance be provided in any precinct where 3 per cent or more of the voting age citizens are in a language minority group. The California secretary of state, March Fong Eu, has determined that in San Francisco this involves help in 54 precincts in Samoan, Japanese and Tagalog (Philippine) in addition to Spanish and Chinese.

The costs of compliance include translation into the ethnic language, additional paper, ink, printing, postage and hiring bilingual helpers to assist at the polls. Compared to the overall cost of an election they are not large, as for example in Los Angeles County last November they ran $225,000 out of a total cost of $7 million, or about 3 per cent.

But they can be high on a cost per non-English ballot voted. The types of ballots and voting machines now used in the larger cities preclude the determination of how many non-English ballots are actually voted, but where they have been determined, the number has been very small.

Back in the 1977 election, San Francisco had 477 Chinese and 157 Spanish ballots cast out of a total of 175,000. In the June 1978 primary, Contra Costa County, just east of San Francisco Bay, had only seven Spanish ballots cast out of a total of 227,729, but a great many more had to be printed, so the total cost of the program was some $29,000 which made each Spanish ballot used cost over $400.

It seems to be the rule that much more non-English voting information is requested than actual ballots voted. The source of such requests is especially interesting in Contra Costa since many of them come from Orinda and Lafayette, both high-income suburbs, and Rossmoor, a retirement community. This suggests that some of the citizens were brushing up on their Spanish at the expense of the taxpayers.

But even if the cost of compliance were zero, serious doubts would remain about the wisdom of the basic principle involved in this act. Someone has written, "The melting pot is a failure." By what data can such a claim be substantiated?

It is hardly open to question that immigrants still come to this country because they expect to live a freer, more productive life here. If their ethnic backgrounds are so important to them, why do they ever leave their native countries? As for American Indians, it does not seem likely that many if any of them need language assistance to take part in the political process of this country.

And what about the foreign born who have gone to considerable trouble to learn English? Is it not an insult to these people to give the same privileges to someone else who refuses to earn them?

A survey of the language minorities might bring out some surprising attitudes. With the next census approaching, some militants seem to be worried that their ethnic group will not be properly counted and thus be deprived of its proper share of federal largess.

But the first national circulation magazine for Hispanic-Americans, *Nuestro*, is written in English. The editor, Dan Lopez, was quoted in the Associated Press as saying, "One of the biggest jobs we've had is to convince potential advertisers that although our market is predominantly Latino, it is primarily English-reading."

Obviously, knowing more than one language is desirable. A great many Europeans, in addition to their own languages, also know English, which is the commercial language of the world. But the wisdom of encouraging the use of another language to the detriment of the use of English is surely open to question.

As they become familiar with the workings of the Voting Rights Act, more and more Americans are likely to ask, as has Sen. S. I. Hayakawa, "What are we trying to do? . . . [create] another Quebec?"

Fortunately there is some hope for a change. Rep. Paul McCloskey (R.-Calif.) has promised to introduce a bill to rescind the bilingual provisions of the act. If and when this happens, the nation will be relieved of another of those do-good dreams which develop in ways never anticipated by their originators.

[From the Washington Post, Apr. 28, 1980]

THE MOBILE DECISION

It is clear that the Supreme Court dealt a sharp blow to black political aspirations in the South last week when it refused to break up the system that almost guarantees Mobile, Ala., an all-white local government. But it is not at all clear that what the justices did was, from the legal point of view, wrong or even that their decision represented a serious setback to civil rights.

Stripped of its nuances, the issue the court had to resolve was whether Mobile should be forced to abandon the form of local government it has had since 1911 because that particular arrangement makes the election of black officials almost impossible. The answer—that Mobile can stay the way it is—derails the legal theory that civil rights lawyers had hoped would force a shift from at-large elections to ward or district elections in cities all over the country.

In this case, the theory asserted that the existence of the commission system of government in Mobile unconstitutionally dilutes the votes of blacks. Because the commission system mandates at-large elections and because Mobile is still given to racial bloc voting, no black has ever been elected to the city government and none is likely to be in the foreseeable future. If the city, which is 35 percent black, were broken into wards, the election of some blacks would be almost assured.

The trouble with this thesis, in the view of several members of the court, is that it rests on the assumption that the constitutionality of any law depends upon the *effects* it has on minority groups. They think laws should be judged on the intent with which they were written. This argument—whether it is effect or intent—has been going on among the justices for years, primarily because neither standard is really satisfactory. Some clearly innocent laws have unintended discriminatory effects on some minorities. Accurately discovering the intent with which legislators acted is extremely difficult.

Judged by its effects, the commission system in Mobile clearly discriminates against blacks. They are not only kept out of office but are also deprived of any real participation in local government and, because their votes are in this sense meaningless, confront a government less than satisfactorily responsive to their needs. But judged by the intent of those who were around in 1911, the commission system does not discriminate against anyone. Blacks didn't vote in Mobile then. Besides, the system was adopted in Alabama, and elsewhere, as a reform of corrupt ward politics.

By opting for intent, or something close to it, a majority of the court has cut down dozens, perhaps hundreds, of legal challenges that would have been made against existing systems of government or multimember legislative districts. It has also avoided the logical terminal point of those challenges: that election district lines must be drawn to give proportional representation to minorities.

Those two factors offset whatever damage may have been done to black hopes of using the legal system to open up all-white local governments. Not all problems of discrimination can (or should) be settled in the courts, and this is one left just as well in the political arena.

[From the National Law Journal, Jan. 12, 1981]

(The Supreme Court's Mobile decision could deal a withering blow to electoral gains by blacks and Hispanics; actual racial bias is held illegal, but dilution of voting power is not)

THE SILENT MINORITIES?

(By Bruce E. Fein)

A trilogy of recent Supreme Court decisions portends pervasive constitutional supervision of voting laws, apportionment plans and political patronage practices. Black and Hispanic voting strength will be critically affected by constitutional rulings of the federal judiciary, and the rich patronage dividends that formerly rewarded success at the polls may be eliminated.

The ruling in *City of Mobile* v. *Bolden*, 100 S. Ct. 1490 (1980), should arrest the attention of political strategists. In that case, black voters brought suit assailing the constitutionality of an at-large electoral scheme for selecting a three-member city commission. Candidates for commissioner must run in one of three numbered posts, and a majority of the total votes cast is needed for election.

The complaint alleged that the at-large voting system diluted the voting strength of blacks in violation of the 14th and 15th Amendments because their electoral importance would be enhanced if commissioners were elected from single-member districts. Following a bench trial, the district court condemned the at-large voting system as unconstitutional, and ordered the replacement of the city commission by a municipal government consisting of a mayor and a city council with members elected from single-member districts. The court of appeals affirmed, but the Supreme Court reversed.

Writing for plurality of four (including Chief Justice Warren E. Burger and Justices Lewis F. Powell Jr. and William R. Rehnquist), Justice Potter Stewart maintained that the 15th Amendment protects against intentional racial discrimination, but not against discriminatory effects. Justice Stewart further insisted that while the 15th Amendment safeguards the right of blacks to vote, it offers no corollary protection against dilution of voting power. The absence of findings that the freedom of blacks to cast ballots had been denied or abridged by anyone was fatal to the 15th Amendment claim of the black voters.

Justice Stewart conceded that the 14th Amendment as expounded in *White* v. *Register*, 412 U.S. 755 (1973), and *Washington* v. *Davis*, 427 U.S. 229 (1976), proscribed electoral schemes conceived or intentionally operated to further racial discrimination. He denied, however, that the findings of the district court and court of appeals demonstrated the requisite intent to discriminate in the establishment and maintenance of Mobile's at-large electoral plan. The subordinate tribunals found it highly probative that no black had been elected to the city commission. Justice Stewart discountenanced that evidence by noting that failure at the polls does not work a constitutional violation. Justice Stewart censured the district court for partial reliance on the finding that city commissioners discriminated against blacks in municipal employment and the provision of public service to support its conclusion that the system for electing the commissioners was constitutionally tainted.

Racial discrimination practiced by public officials, Justice Stewart explained, casts little if any illumination on the validity of the electoral plans under which they attained their offices. Justice Stewart also scolded the district court and court of appeals for pointing to the substantial history of racial discrimination in Alabama to justify overturning Mobile's at-large election plan. He admonished: "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." Finally, Justice Stewart disavowed the conclusion of the lower courts that the majority vote and numbered post appendages to the at-large electoral system demonstrated an intent to discriminate because they weakened the potential influence of bloc voting by minorities. Features of electoral schemes that tend naturally to disadvantage any voting minority, he stressed, are constitutionally unassailable. Accordingly, Justice Stewart declared, the requisite proof for invalidating Mobile's electoral system under the 14th Amendment was wanting.

Justice Harry A. Blackmun concurred in the result because he believed that the district court's wholesale dismantling of Mobile's commission form of government was incompatible with sound judicial discretion. He avoided the question of whether intent to discriminate is a necessary element of a viable 15th Amendment claim, and would have found in any event that the requisite intent had been shown.

Justice John Paul Stevens also concurred in the judgment, but voiced disagreement with Justice Stewart on the question of intent as an element of a 15th Amendment violation. He declared that the demarcation of electoral boundaries is unconstitutional if it is not the product of a routine political decision, has a significant adverse impact on a minority group and is unsupported by any neutral justification. Justice Stevens also disputed the plurality's conclusion that the 15th Amendment had no application to a plaintiff's claim of unconstitutional vote dilution.

Justice Byron R. White, dissenting, declined to reach the intent issue under the 15th Amendment because he believed intentional racial discrimination had been proven. Justices Thurgood Marshall and William J. Brennan Jr. agreed with this conclusion, but further maintained that racially discriminatory effects are sufficient to establish a 15th Amendment violation.

The decision in *Mobile* leaves unresolved two critical election law issues: whether intentional racial discrimination is a necessary element of a 15th Amendment violation; and whether the amendment has any application to claims founded on allegations of unfair dilution of voting power. Equally unsettling is the fact that the justices exhibited divergent approaches to assessing proffered evidence of racially discriminatory intent. The equivocal *Mobile* ruling permits the approximately 650 subordinate federal judges a wide latitude in confronting claims of unconstitutional vote dilution. Selected from the cauldron of partisan politics, these federal judges will undoubtedly split in resolving such claims, pregnant with consequences for their political benefactors. That party allegiance is ascendant in the appointment of federal judges is confirmed by statistics showing the percentage of federal judicial appointees who shared the party allegiance of the appointing president:[1]

Cleveland (Democrat)	97.3
B. Harrison (Republican)	87.9
McKinley (Republican)	95.7
T. Roosevelt (Republican)	95.8
Taft (Republican)	82.2
Wilson (Democrat)	98.6
Harding (Republican)	97.7
Coolidge (Republican)	94.1
Hoover (Republican)	85.7
F. D. Roosevelt (Democrat)	96.4
Truman (Democrat)	93.1
Eisenhower (Republican)	95.1
Kennedy (Democrat)	90.9
L. B. Johnson (Democrat)	95.2
Nixon (Republican)	93.7
Ford (Republican)	81.2
Carter (Democrat)	[1]97.8

[1] As of Oct. 1, 1980.

Whether an electoral system inimical to the political interests of minorities will survive constitutional scrutiny may be influenced by the partisan leaning of subordinate federal judges so long as the Supreme Court declines to restrain their discretion through authoritative and convincing constitutional pronouncements.

The 1980 census will spawn countless state and local apportionment plans for electing a vast array of federal, state and local officials in order to conform to the one-person, one-vote edicts of the Supreme Court.[2] Judicial decisions holding that electoral plans that splinter the voting strength of racial minorities can be invalidated under the 15th Amendment without proof of intentional discrimination will buttress the political influence of blacks and Hispanics in fashioning reapportionment plans and companion alterations in voting laws.[3]

The potency of a constitutional standard that would interdict any electoral scheme with racially discriminatory effects was demonstrated in *City of Rome* v. *U.S.*, 100 S. Ct. 1568 (1980). In that case, the court confronted a provision of the Voting Rights Act of 1965 that requires all covered jurisdictions to submit for approval any change in a "standard, practice, or procedure with respect to voting" to either the attorney general of the United States or to a federal district court. Disapproval is required if the proposed change has a racially discriminatory effect. In 1965, the attorney general designated Georgia a covered jurisdiction under the act, which under the decision in *U.S.* v. *Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110 (1978), subjected all Georgia municipalities to the preclearance procedures for altering voting laws.

With a population consisting of approximately 75 percent white and 25 percent black citizens, the city of Rome, Ga., submitted to the attorney general several changes regarding the election of its city commission and board of education. Existing law provided for a nine-member commission and a five-member board elected concurrently on an at-large basis by plurality vote. The city was divided into nine wards, with one city commissioner from each ward to be chosen in the city-wide election. There was no residency requirement for board of education candidates.

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[1] See H. Abraham, Reflections on the Recruitment, Nomination, and Confirmation Process to the Federal Bench. Address at American Enterprise Institute Symposium. The Federal Courts: 1980 (Oct. 1, 1980, Wash. D.C.) p. 16.

[2] See White v. Weiser, 412 U.S. 783 (1973) (congressional districts); Gaffney v. Cummings, 412 U.S. 735 (1973) (state districts); Avery v. Midland County, 390 U.S. 474 (1968) (local districts).

[3] The Census Bureau estimates that in 1979 there were 25 million black and 12 million Hispanic residents in the United States, comprising 11.6 percent and 5.6 percent of the population, respectively.

The attorney general rejected proposed changes that would have mandated the election of commissioner and board members by majority vote and for staggered terms, would have imposed residency requirements on board candidates, and would have limited commission candidates to running for one of three numbered posts established in three wards. These electoral changes in a city such as Rome where racial bloc voting was common would diminish the opportunity of blacks to elect a candidate of their choice, the attorney general explained. He further refused to approve 13 annexations to the city for purposes of commission elections on the ground that they threatened dilution of the black vote since the annexed territories were or would likely become predominantly white. The Supreme Court, by a 6–3 vote, endorsed the attorney general's findings that the proposed changes would have racially discriminatory effects.

In sum, the nation's political machinery for electing public officials will be profoundly affected by the Supreme Court's ultimate resolution of the question of whether the 15th Amendment proscribes electoral laws that have the effect of diluting the bloc voting power of racial minorities.

Successful candidates and incumbents will be dismayed by the impoverished opportunities for the use of patronage to attract and to maintain political support presaged by *Branti* v. *Finkel*, 100 S. Ct. 1287 (1980). By a 6–3 vote in *Branti*, the court held that assistant public defenders enjoy constitutional protection against discharge inspired solely because of their political affiliation. Writing for the majority, Justice Stevens proclaimed that public employment could be conditioned on party loyalty only if such political allegiance "is an appropriate requirement for the effective performance of the public office involved." Justice Stevens grudgingly conceded that this proclamation would permit a governor to demand particular party affiliation of various assistants who help him write speeches, explain his views to the press or communicate with the legislature.

The overwhelming proportion of executive branch employees who work outside this narrow enclave, however, is not entrusted with duties whose effective performance demands political loyalty. And with specific regard for employees involved in law enforcement, the court asserted in *Berger* v. *U.S.*, 295 U.S. 78, 88 (1935), that their foremost public duty is to administer the law so that justice is done, a duty that transcends party allegiance. The *Branti* and *Berger* decisions, therefore, seem to taint resort to political patronage to hire and fire the vast majority of executive branch employees, and to frown on any patronage appointments to offices responsible for law enforcement. Sequel Supreme Court decisions that unfold the full meaning of *Branti* and *Berger* may deprive political party membership of its erstwhile allure.

[From the Washington Star]

Proof and Prejudice

(By Senator Orrin G. Hatch)

A significant but little noticed development in the area of civil rights has been the gradual abandonment of the concept that proof of discrimination requires proof of discriminatory intent. Increasingly courts and executive agencies have interpreted civil rights laws in a way in which the motivation becomes irrelevant.

Thus a New York City apartment owner is sued under the federal open housing act because he adopts a policy requiring tenants to have weekly salaries equaling at least 90 per cent of their monthly rental. The claim is that such a policy will have the "effect" of discriminating because a disproportionate number of welfare recipients (ineligible for tenancy because they have no salary) are members of minorities.

A small suburban community is sued under the same act because of a "minimum lot size" zoning policy designed to maintain the upper middle-class character of the community. Here, the claim is similar. Because such a zoning measure will limit community residence to relatively well-to-do individuals, it will have the "effect" of discriminating against racial minorities who tend disproportionately to be less financially able.

In both instances, it makes little difference that there might have been legitimate business or public policy justifications for an action; or that there existed no evidence to suggest that such actions were adopted with an eye toward discrimination.

What has been taking place here, as well as in other areas of civil rights policy, has been the creation of an entirely new test for determining the existence of illegal discrimination. Instead of the traditional test of looking to the purpose or motivation behind an action—did the apartment owner intend to deny housing opportunities to blacks or Puerto Ricans?—the new "effects" test looks primarily to statistics.

If a community (or an apartment or subdivision), for example, contains 14 per cent minority group members while the surrounding metropolitan area contains 30 per cent minority group memebrs, then that community immediately becomes suspect in the eyes of the federal government. Never mind that no evidence exists to suggest that the community developed in anything other than a benign and natural manner. In the view of at least some courts that have adopted the "effects" test, there is absolutely nothing then that the community can do to rebut the presumption of discrimination.

LABELING "VIOLATORS"

What is so wrong with the "effects" test as a means for identifying discrimination is that it labels as "civil rights violators" individuals and communities who have no wrongful purpose or motivation. They become vulnerable to prosecution purely on the basis of accommodating a balance of races or sexes or ethnic groups that the government finds "unrepresentative."

In addition, the "effects" test invests tremendous potential authority in the bureaucracy to indulge in the sort of social engineering that has been so strongly resented by the American public. Once the "effects" test has been put into effect, what is the standard for determining that discrimination remedies are no longer needed short of absolute numerical equality?

Proponents of the "effects" test have argued that reliance upon the traditional "intent" test makes it more difficult to secure successful prosecutions because of the often subtle nature of such discrimination. This may be marginally true. There are many elements in our system of justice that make it more "difficult" to successfully prosecute. If, for example, prosecutors did not have to prove guilty "beyond a reasonable doubt" in criminal cases, prosecutions would be much easier to secure. There, quite simply, are other relevant considerations, such as due process of law.

No one has ever suggested that the "intent" test requires outward expressions of bigotry in order to prove discrimination. The test permits all circumstances to be considered—including the "effects" of an action or policy.

Continued use of the "effects" test by the federal government carries substantial implications for the role of Washington in our country. Particularly in the area of zoning and land-use policy, the test has the potential for radically transforming the relationship between the federal government and the states and localities. It is an issue that Congress will address before the end of the present session.

[From the Washington Post, Aug. 4, 1981]

VOTING RIGHTS: TO WHAT ARE MINORITIES ENTITLED?

(By Abigail M. Thernstrom)

So far the debate on the renewal and revision of the Voting Rights Act—due to expire in August 1982—has not been very edifying. Exaggerated charges and counter-charges have obscured the real complexities of the issue.

It would thus seem a welcome sign that a compromise bill has emerged in the House Judiciary Committee that would allow counties with a history of "good behavior" to extricate themselves from the most intrusive provisions of the act. In fact, as the bill is currently written, no southern county is likely to meet the stringent criteria established. Those who drafted the bill clearly believe that the act should continue to cover the entire Deep South, and if the bill is passed, they will probably get their way.

A few basic facts. The initial aim of the 1965 act was the enfranchisement of southern blacks, and that goal was quickly met. Nor can the ballots once again be taken away. The literacy test (fraudulently administered) was the chief means of disenfranchisement, and the ban on such tests will remain. Criminal penalties for voting fraud are here to stay. They are among the permanent provisions of the Voting Rights Act.

It is thus necessary to take with a grain of salt the assertion, frequently made, that if the act is allowed to expire, the South will return to its pre-1965 ways. "Minorities stand perilously close to where they were in 1877, when the nation, grown weary of the race issue, agreed to let local officials deal with voting rights as they saw fit," one civil rights attorney has recently written. But history won't repeat itself. There are neither the economic nor the political conditions for renewed, widespread oppression.

Yet also deserving skepticism is the assertion that black voting has so radically transformed the structure of southern politics that the temporary provisions of the act are no longer necessary. Those who want to see the act renewed, but greatly watered down, argue that to retain all the current provisions is to penalize the South for its past. Yet in many places that past is clearly present. Not penalties, but protection, is what supporters of the act clearly have in mind.

Much less clear, however, is the extent of the need for such protection. The gains are less fragile than some assert, but we lack an accurate sense of the magnitude of actual change. Conflicting conceptions of the South abound, and they are at the heart of the dispute over the act's renewal. Primarily at issue is what is known as Section 5: the provision in the legislation that protects against discriminatory changes in electoral procedures. Black or Hispanic ballots do not everywhere ensure actual power. The gerrymandering of district lines to the advantage of white voters, the institution of at-large elections, and the annexation of largely white suburbs—such changes in municipal and other electoral systems can sigficantly diminish the impact of the ballots cast. Section 5 requires that all such alterations in the electoral systems of "covered" jurisdictions (mostly in the South) must be "precleared" by either the U.S. Department of Justice or the D.C. District Court.

Yet not all at-large voting or disadvantageously drawn district lines are discriminatory. At-large systems in the North are considered legitimate. A certain amount of ethnic-bloc voting is accepted as normal. And thus to the degree that the political process in a southern city or county has come to resemble that in the North, it too is normal.

From the outset, white southerners saw Section 5 as having reduced their region to the status of a conquered territory. Southern states, they said, were forced to go to Washington, hat in hand, to beg permission to change their electoral laws. Time has not assuaged this resentment, to which northern conservaties have now lent a sympathetic ear.

Of course, the conquered territory image was always hyperbole. And the fact is that abuses in the North were less likely to be racially motivated than those in the South. As recently as June 2, federal observers were sent to Mississippi to protect blacks against discrimination in an election.

Yet, the assertion, on the other side, that the problems in a particular Mississippi town on June 2 are typical of those in the entire South, and that the rhetoric of local control is nothing but a cover-up for white racism, is also wrong. When the Voting Rights Act was first passed, Section 5 was considered a draconian measure; only the severity of the problem warranted such a severe solution. Over time, the provision has come to be seen by some as part of the natural legislative landscape. In fact, as the Judiciary Committee has ostensibly recognized, it should not be, and in renewed and revised legislation, some jurisdictions should be allowed provisionally to "bail out" and regain autonomy over their local electoral process.

Which jurisdictions? Take a southern county that is approximately 40 percent black, that has never been a defendant in a suit alleging racial discrimination, that has a record of electing blacks to a school board and of appointing blacks to various boards, and that appears to distribute its public services equally among all sectors of the population. If elections at-large for the county commissioners replace an appointive system, should the Department of Justice have the power to insist on single-member districts on the grounds that with such districts more blacks would most likely be elected? Or should Section 5, the special remedy for a special wrong, no longer apply?

Settling that question requires answering a more basic one: namely, the meaning of electoral discrimination. We talk of the "dilution" of the minority vote, but in fact we don't know what a "full" vote is. To what, precisely, are minorities entitled? It is the fundamental issue that 15 years of experience and litigation have not yet settled. And as long as it remains unsettled, the basic goal of the Voting Rights Act will remain elusive. Is an integrated political process the aim—a person in which minorities have electoral opportunities equal to those of whites but are guaranteed no particular results? Or is the goal black and Hispanic political power with seats in proportion to the minority population?

These are just some of the questions a renewal of the Voting Rights Act raises, and the answers are far from obvious. William Jennings Bryan once said in reference to Prohibition: "This is a moral question. There is but one side to a moral question." In 1965, the passage of the act was just such an issue, but the precise form its extension should take is not. We need to be wary of our instincts, and give ourselves time to think.

[From the Lancaster (South Carolina) News, Oct. 2, 1981]

VOTING RIGHTS ACT: THE REAL ISSUE BEYOND RHETORIC

(By Robin D. Roberts)

Recently, there has been much discussion about the Voting Rights Act, and this newspaper has published articles on the subject. This certainly is an emotional issue for some people, but that only emphasizes the need for a full discussion of the Act. All too often, articles display a fundamental misunderstanding of this law. In the interest of a full discussion, we need to take a look at what the Act is, and what the Act does.

First, the Voting Rights Act does not expire next year, or any other year, because the Act is permanent. Second, even if the Act were repealed—which is not remotely possible in the forseeable future—no one would lose his right to vote. What everyone must understand is that even if there were no Voting Rights Act, any attempt to deprive any person of his right to vote because of his race could be challenged in court. While many people feel that the Act has been benefiscal, it simply is not true that the Act is necessary to allow anyone to vote. Those who claim that the Act is about to expire, or that anyone, or any group is about to lose the right to vote is either uninformed or trying to mislead people about a matter of great concern.

Then, why is there so much interest in the Voting Rights Act? Simply stated, next year will represent the first time since the Act was passed in 1965 that those states which are severely affected by the Act, generally, South Carolina, part of North Carolina, Virginia, Georgia, Alabama, Louisiana and Mississippi will have a chance to show why they should no longer be singled out by it. To understand better the ramifications of this possibility, we need to review the history and provisions of this Act.

LITERACY

In 1965, the year after Lyndon Johnson's landslide victory over Barry Goldwater, Congress determined that certain Southern states were using literacy tests to prevent blacks from voting. In an attempt to prevent this, Congress decided to single out these "guilty" states. Congress assumed a state was discriminating if it had used a literacy test in 1964 and if there had been a low voter turnout for that election. Low turnout existed if less than 50 perecnt of the registered voters in a state had voted or if less than 50 percent of the eligible persons in the state had registered to vote.

On the basis of this presumption, those selected states were subjected to close federal supervision to ensure that all of the state's laws affecting voting were nondiscriminatory. Of course, this requirement that a state "preclear" its laws with Washington was an extraordinary intervention into the authority of the states to control their own election laws, a right specifically recognized by the Constitution.

Because this federal intrusion was so unusual (U.S. Supreme Court Justice Black remarked that covered states were treated as "little more than conquered provinces") Congress decided that a covered state which did not use the literary test or similar device for five years would be allowed to petition the federal court in the District of Columbia to "bail-out" or escape the special preclearance requirement.

However, when those five years were about to elapse, thereby giving the covered states an opportunity to show why they should no longer be under federal supervision, Congress extended the deadline until 1975. Then in 1975, Congress again extended the deadline, this time until 1982. Now, as the 1982 deadline approaches, some people want to extend the automatic application of the preclearance provision for another ten years. There is little wonder that covered states oppose a new extension. These states have been singled out because of 1964 election results and for the past seventeen years (which is longer than Reconstruction lasted) they have been forced to obtain federal approval for any changes in their election laws while other states have been free to act without orders from Washington.

NO WAY TO BAIL OUT

The real problem with the further extension of the current Act is the absence of any way for states once covered, to bail out of the preclearance. Under the present law, even if a covered state has a spotless civil rights record for the past seventeen years it still must preclear its laws with Washington. At the same time, a non-covered state, which might be guilty of obvious discrimination in voting, is free of this supervision by Washington. To make matters worse once a state is subject to preclearance, no political subdivision (like a county or a city) in that state can bail out.

Here, one point must be emphasized. When the deadline arrives in 1982, covered states will not automatically be free of preclearance; they will merely be given the chance to have a fair hearing in federal court in Washington. Then, if the court does allow the state to bail out, the court will maintain jurisdiction over that state for an additional five years to prevent discrimination in voting practices. Opponents of a fair bail-out really want to deny a covered state a chance for a fair day in court.

FEDERAL APPROVAL

Once a state is subject to preclearance, all of its laws affecting voting or elections must be approved in advance by either the federal District Court for the District of Columbia or by the U.S. Attorney General. This means that absolutely nothing about the election process can be changed without federal approval. While the application of this preclearance requirement to some actions is clear—for example, reapportionment of Congressional or state Legislative districts—the need to preclear other types of action is less obvious. For example, the county registrar cannot change rooms, even in the same building; a city cannot move a polling place from the school gym to the school lunchroom; or a school board cannot change to, or from, an at-large election system until Washington first approves. Although it may seem impossible, the law is even more far-reaching; a city cannot annex a new area without federal approval for the annexation might change the racial composition of the city's electorate. Although one might be tempted to justify such extreme federal intrusion as necessary to protect the voting rights of blacks or other minorities, that just is not the case. Any voting law which attempts to discriminate on the basis of race is unconstitutional and could be challenged in federal court.

Even the most ardent supporters of so-called extension of the Voting Rights Act must admit, in their private moments, that the current law is unfair, because there is no allowance to bail out. What many proponents of extension really want is something far beyond the original purpose of the Act. They want the Act to be interpreted to require the election of black officials to represent black voters. The purpose of the Act is to ensure that all persons have an equal access to the election process—that no one is denied the right to vote because of race; the Act was never intended to ensure any particular election results. The claim that the Act requires certain persons to be elected is completely foreign to our democracy. The idea that a person can only be presented by someone who is the same color and sex has no place in our system of government. The password for our electoral system is, and should be, equal access not mandated results.

DEADLINE APPROACHES

The issue now facing Congress is what to do as the deadline approaches in 1982. Some people have indicated that they will support an extension only if all states are subject to this strict federal supervision. They believe that no states should be singled out that attempts at discrimination everywhere should be opposed. Others want the preclearance provisions extended as they now exist, which would doom the covered states, which have been punished for seventeen years, to an additional period of degrading federal supervision. President Reagan plans to announce his position on the Voting Rights Act in early October. Candidate Reagan campaigned against having this law single out one section of the country, and therefore, he is unlikely to press for mere extension of the current law. Although President Reagan has recently indicated some support for the Act, he is not likely to doom summarily the South to this continued stigma.

I believe that the President will propose that preclearance be extended, but with a reasonable method of bail out. This way, states which have acted properly will be rewarded, and the government can concentrate on an effective program on eliminating discriminatory practices where they do exist. Such a proposal is not only politically wise, it is fair.

The White House

OFFICE OF THE PRESS SECRETARY

[For Immediate Release, Nov. 6, 1981]

Statement by the President

Several months ago in a speech, I said that voting was the most sacred right of free men and women. I pledged that as long as I am in a position to uphold the Constitution no barrier would ever come between a secret ballot and the citizen's right to cast one. Today I am reaffirming that commitment.

For this Nation to remain true to its principles, we cannot allow any American's vote to be denied, diluted or defiled. The right to vote is the crown jewel of American liberties, and we will not see its luster diminished.

To protect all our citizens, I believe the Voting Rights Act should and must be extended. It should be extended for ten years—either through a direct extension of the Act or through a modified version of the new bill recently passed by the House of Representatives. At the same time, the bilingual ballot provision currently in the law should be extended so that it is concurrent with the other special provisions of the Act.

As a matter of fairness, I believe that states and localities which have respected the right to vote and have fully complied with the Act should be afforded an opportunity to "bail-out" from the special provisions of the Act. Toward that end, I will support amendments which incorporate reasonable "bail-out" provisions for States and other political subdivisions.

Further, I believe that the Act should retain the "intent" test under existing law, rather than changing to a new and untested "effects" standard.

There are aspects of this law, then, over which reasonable men may wish to engage in further dialogue in coming weeks. As this dialogue goes forward, however, let us do so in a spirit of full and total commitment to the basic rights of every citizen.

The Voting Rights Act is important to the sense of trust many Americans place in their Government's commitment to equal rights. Every American must know he or she can count on an equal chance and an equal vote. The decision we are announcing today benefits all of our citizens by making our democracy stronger and more available to everyone.

[From the New York Times, Nov. 8, 1981]

"Intent": Crux of Debate on Many Bills

(By Stuart Taylor, Jr.)

Washington, Nov. 8.—A slippery legal concept called "intent," mentioned by President Reagan in his statement last week on extending the Voting Rights Act of 1965, lies at the heart of current legislative debates on other issues ranging from protection of intelligence secrets to bribery of foreign officials.

"I believe that the act should retain the 'intent' test under existing law, rather than changing to a new and untested 'effects' standard," the President said Friday, referring to the standard of proof necessary to show voting discrimination.

Some of Mr. Reagan's conservative allies in Congress, such as Senator Orrin G. Hatch, Republican of Utah, also want to put intent into other civil rights laws, for example, to make it harder to prove job discrimination and housing discrimination.

But the Reagan Administration and its allies want to take "intent" out of a bill that would make it a crime to impair intelligence activities overseas by publishing the names of American spies.

Liberal groups like the American Civil Liberties Union want to do exactly the opposite in each context.

NO CONSENSUS ON "INTENT"

And the same conservatives who want to take the concept of intent out of the bill involving exposure of Government intelligence agents who spy on foreign officials want to put it into a 1977 law aimed at companies with overseas "marketing agents" who bribe foreign officials.

The common assumption underlying these superficially inconsistent positions seems to be that if you do not like a law, or think it goes too far, the best way to weaken it or narrow it is to make it harder to prove a violation. And one way to do that is to throw in a dose of intent, more precisely, to specify that actions that produce certain undesirable results are illegal only if undertaken with the intent of doing so.

The legislative strategies and debates are complicated, however, because legislators and lawyers have been arguing for hundreds of years about the precise legal meaning "intent." They have not yet come to a consensus, and judges and juries are often confused.

For example, there is the old law school question about the assassin who blows up a carriage carrying the royal family in order to kill the king. Did the assassin also intend to kill the queen?

If 100 lawyers were asked this question, 50 might say yes because the assassin knew the queen would die if his bomb went off. Fifty others might say no, because his objective or purpose was to kill the king and he was indifferent to the queen's fate.

PLUMBING HUMAN MOTIVATION

Notwithstanding this confusion, legislators and lobbyists know that it is almost always easier to prove that something has happened, and that anybody with any sense would have known it was going to happen, than to use the blunt instrument of "intent" to plumb the obscure wellsprings of human motivation that made it happen.

It would be easier, for example, to prove that a city government diluted the voting strength of members of minority groups when it adopted an at-large election system than to prove that the city did so with the intent of racial discrimination.

It would also be easier to prove that a journalist who published the name of undercover American spies in a foreign capital should have known he might impair intelligence operations than to prove that that was his objective.

And it would be easier to prove that a company seeking business in a notoriously corrupt foreign country should have known that part of the large "fee" demanded by its "marketing agent" might be passed along to an official than to prove that the company intended to bribe the official.

The legal distinction between "intent" and "results" (also referred to as "effects" or "impact") crops up in virtually every area of the law. Proof of intent is required to win a conviction for most serious crimes, and is often crucial in civil cases involving, for example, libel, securities fraud, price-fixing and school segregation.

This distinction has been most hotly debated in recent years in the context of voting rights and other civil rights issues.

Senator Hatch and other conservatives have introduced proposals to require proof of "intent to discriminate" to establish violation of any civil rights law, including laws that prohibit discrimination in jobs and housing.

They draw encouragement from several Supreme Court rulings in the last five years, requiring proof of racially discriminatory intent to establish that governmental actions violate the constitutional guarantee of "equal protection of the laws" and the Voting Rights Act as it is now worded.

And they hope to overrule earlier decisions, in which the Supreme Court ruled that proof of racially disparate "impact," or "effects," ordinarily suffices to establish violations of the equal employment opportunity provisions of the Civil Rights Act of 1964. The majority of the Federal appellate courts have ruled that similar evidence of "effects" establishes violation of the Fair Housing Act of 1968.

1980 COURT RULING CITED

A 1980 Supreme Court decision interpreting the Voting Rights Act as well as the 14th and 15th Amendments set the stage for the legislative debate over "intent." By a narrow majority, the Justices ruled that the Court ruled that proof of intentional racial discrimination was necessary to invalidate election procedures that diluted black voting strength.

The majority said that the rights of black voters in Mobile, Ala., which is 35 percent black, had not necessarily been violated, even though the combined effect of the city's at-large election procedure and racial bloc voting had been to prevent any black from ever winning election to the three-member City Commission.

The bill to extend the Voting Rights Act that was passed by the House last month, by a vote of 380 to 24, would overrule the Mobile decision, and would invalidate election procedures that operate "in a manner which results in" racial discrimination.

Civil rights groups supporting the House-passed bill have attacked the "intent" test advocated by Senator Hatch as "often a code word for allowing discrimination to go on," in the words of Ralph Neas, executive director of the Leadership Conference on Civil Rights.

MEMO FROM ATTORNEY GENERAL

But Mr. Reagan accepted Attorney General William French Smith's recommendation that he oppose the House-passed bill's "results" test. The House provision was designed "to facilitate challenges to the at-large method of election and other practices that dilute the voting strength of minority groups," Mr. Smith said in a memorandum suggesting that the bill be rejected.

For all the disputation, there is considerable overlap between proving "intent" and proving "results." In the Mobile case, for example, four Justices argued that discriminatory intent had been proved in light of "the totality of the relevent facts, including the discriminatory impact of the statute," in the words of Justice Byron R. White.

So, no matter what Congress does in the current legislative battles on whether to put "intent" into this or that law, the lawyers and judges will be arguing for years about what Congress intended to do.

[From the Congressional Quarterly Inc., Jan. 9, 1982]

"INTENT" A KEY ISSUE IN VOTING RIGHTS DEBATE

(By Nadine Cohodas)

When a Senate Judiciary subcommittee begins hearings Jan. 20 on extending the 1965 Voting Rights Act, one of the most controversial issues will be the legal standard required to prove certain voting law violations.

Sen. Orrin G. Hatch, R-Utah, whose Constitution Subcommittee will be holding the hearings, wants to require litigants to show an intent to discriminate. He contends it is unfair "to brand people racist" without proving that they actually meant to discriminate.

At a Dec. 17, 1981, news conference, President Reagan also said he believed that an intent to discriminate should be established before a voting law violation is found.

Members of the civil rights community disagree. They are pressing for language that would allow voting rights violations to be proved by showing that certain procedures produced discriminatory results.

A bill passed Oct. 5, 1981, by the House (HR 3112) included such language. A measure identical to HR 3112 was introduced Dec. 16 in the Senate (S 1992), and supporters claimed 61 cosponsors. (*House bill, 1981 Weekly Report p. 1965; Senate bill, 1981 Weekly Report p. 2526*)

SECTION FIVE: PRE-CLEARANCE

Thus far in the voting rights debate, attention has focused primarily on the drive to extend Section Five, the key enforcement section of the landmark 1965 law. Without further congressional action, this provision expires Aug. 6, 1982.

Known as the pre-clearance provision, Section Five requires nine states and portions of 13 others to get Justice Department approval for election law changes.

Section Five will not actually expire the way a yearlong appropriations law does, for example.

The term is used because by Aug. 6, 1982, all areas now covered by Section Five will be able to meet the law's test for escaping coverage. That test requires any area to refrain from using a literacy test for 17 years and to have at least 50 percent of its voting-age citizens registered.

The only way to continue the pre-clearance procedure would be to require an area to have refrained from using a literacy test for another period of years, because all areas now meet the 50 percent registration requirement and have not used literacy tests since 1965.

The House bill and its Senate companion extend Section Five in its present form for two years. In 1984, the pre-clearance requirement would become permanent, but a new "bailout" section would go into effect. This would allow covered states to get out from coverage if they had met conditions specified in the bill.

There is a consensus among many senators that Section Five should be extended and that some form of new bail-out provision should be included in the bill, according to Stephen J. Markman, general counsel on Hatch's subcommittee.

THE "INTENT" DEBATE

The intent issue has been raised in connection with Section Two of the act. This provision, which is a restatement of the 15th Amendment to the Constitution, prohibits states and political subdivisions from adopting any election law or procedure that denies or hampers an individual's right to vote because of race or color.

Section Two applies to all states, including those covered by the Section Five pre-clearance provisions. Section Two covers any discriminatory voting practice in the covered jurisdictions that might have been initiated prior to 1965.

THE SUPREME COURT DECISION

In an April 1980 decision, the Supreme Court interpreted Section Two to require the showing of intent to prove a violation of the provision. The case involved a suit against Mobile, Ala., officials that challenged the city's at-large election system. (*1980 Weekly Report p. 1190*)

The court said challengers had to prove that city officials, in adopting the at-large system, intended to keep blacks from winning office. Discrimination, the court said, could not be proved merely by showing that no blacks had been elected to the city commission even though blacks made up one-third of the city's population.

Both the House bill and S 1992 contain language intended to overturn the *Mobile* decision by specifying that a violation could be proved by showing that an election procedure "results in the denial or abridgment" of the right to vote.

Frank Parker, a veteran civil rights litigator, said the intent standard was virtually impossible to meet.

"What proof of discriminatory intent really boils down to is having to prove what is in the minds of legislators or the voters who adopted or maintained a discriminatory electoral system," said Parker, director of the Voting Rights Project of the Lawyers Committee for Civil Rights Under Law.

Hatch disagrees that "intent" is impossible to prove. He has said repeatedly that it could be proved with circumstantial evidence.

Markman said in an interview that Hatch was not asking litigants "to read minds. We're not asking for a smoking gun."

Parker was not mollified by such observations. "Sen. Hatch cannot dictate how courts are going to decide cases on the basis of his own statements," he said.

Parker added that it is difficult to come up with circumstantial evidence. He explained:

"In instances in which discriminatory election procedures were adopted in the early 1900s, it is impossible to prove discriminatory purpose. The newspaper accounts are inadequate and incomplete. No witnesses are alive today. We cannot subpoena someone from the grave to testify."

Markman said that even if intent is difficult to prove, that should not be the prime consideration.

"The decision on what standard to use should not be made on the basis of what facilities the finding of a violation," the staffer said, "but on what is fair."

[From the Wall Street Journal, Jan. 19, 1982]

VOTING WRONGS

New amendments to the Voting Rights Act of 1965 are up for Senate hearings this week and we wonder if the subcommittee on the Constitution will notice that they have a strange little quirk: In the name of protecting the right to vote they expand federal power to outlaw local elections. The contradiction escaped notice in the House, which already has passed the amendments.

This seems to be a case of Congress not knowing where to stop. The act, originally designed to overcome systematic denial of access to the polls in certain Southern states, has largely accomplished its purpose. In Mississippi, for example, 67 percent of the eligible blacks are registered, a tenfold increase from 1965. But in 1975 the law was expanded beyond the South and extended to "language minorities" as well. Today, because of "trigger mechanisms" that invoke the law where violations are suspected, all voting districts in nine states and some in 13 others are required to "preclear" with the Justice Department any proposed changes in election procedures. Thirty states are required to provide bilingual election material and assistance.

Around 35,000 proposed election law changes have been submitted to the Justice Department since 1965. Of those, Justice refused to allow 811, the bulk of which involved alleged reductions in "minority" voting power through districting changes and use of at-large as opposed to district representation. In some cases, Justice has blocked elections; New York City, for example, has yet to hold its 1981 City Council elections because of a redistricting dispute with Washington.

In only about a tenth of these cases did Justice find any "intent" to discriminate; in the rest, under the act's strict "preclearance" test, it merely found that the proposed changes would have a discriminatory "effect." This "effects" test currently applies only to those states and localities which had a history of intentional discrimination or disproportionate voting patterns.

The Supreme Court has ruled that in other parts of the country the government must first prove "intent" to discriminate before it can apply the provisions of the act. Moreover, in upholding Mobile, Alabama's at-large voting system in 1980, the Court said that some existing election practices may result in low representation of minorities among elected officials but that doesn't itself constitute "purposeful" discrimination. "The 15th Amendment," it added, "does not entail the right to have Negro candidates elected."

The House amendments to Section 2 of the Voting Rights Act would depart dramatically from the Court's logic. The federal government would no longer have to prove "intent" to discriminate in elections. It could merely cite voting practice "results" in alleging discrimination. The amendments would obligate the Justice Department to review elections in every state and municipality in the nation and to look not only at proposed changes in procedures but also at every existing election law. The biggest target would likely be the at-large system of voting used in two-thirds of the moderate-size municipalities in the U.S.

Now, the at-large system isn't perfect, but it does have certain merits and, indeed, has often been adopted in reform movements. For one thing, it makes it impossible for incumbents to hang onto their seat through redistricting.

We learned a long time ago that when you allow the Feds to assess "results," they end up doing it by essentially racist methods, dividing the community into the various races and ethnic groups the law happens to cover and trying to provide each with a representative. Somehow this doesn't strike us as the way we should be moving if we are trying to remove the vestiges of racism in American society. Moreover, we don't find it comforting that the result so far of many disputes between the Feds and the local authorities often has been to suspend election, disfranchising voters and allowing the incumbents to stay in power.

The amendments the Senate will vote on soon should be scrubbed in favor of a return to the intent test and a planned phase-out of the Voting Rights Act altogether as it becomes increasingly evident that no one is being kept from the polls because of his race, creed or color. Otherwise, we will end up with more, not less, racial and ethnic polarization.

[From the Richmond Times-Dispatch, Jan. 20, 1982]

"EFFECT" VERSUS "INTENT"

If the U.S. Senate concurs in the House-passed Voting Rights Act extension bill, local and state governments could be subjected to tremendous harassment by groups alleging violations of their voting rights.

The bill's provision that could have far-reaching chaotic results would provide that no voting practice or procedure "shall be imposed or applied by any state or political subdivision in a manner which *results* in a denial or abridgement of the right to vote." [Italics added.] The provision in the present law that it would replace says that no voting practice or procedure "shall be imposed by any state or political subdivision to deny or abridge the right of any citizen of the United States to vote. . . ."

In other words, if any action had an *effect* that someone could allege was denying or abridging the right to vote, that action could be challenged in court, even if there were no intent whatever to discriminate and there were legitimate reasons for the action, entirely apart from any racial issue.

No fair-minded person wants to see any individual's right to vote denied or abridged, whether the denial or abridgement is intentional or unintentional. But the "right to vote" often is broadly interpreted by the Department of Justice and the federal courts to go far beyond the question of casting of ballots. It is held to be a denial of a person's voting rights if, for example, any action is taken to "dilute" his vote. A black citizen's voting rights are violated, according to such interpretations, if a city annexes territory that brings in a large number of whites, resulting in a situation in which the blacks have less voting power, proportionately, than they formerly had.

In seven Southern states, including Virginia, and in parts of 16 other states, the *effect* rule already applies to actions taken by states and cities since the Voting Rights Act was originally passed in 1965. These are the areas covered by the preclearance provision of the act, meaning that no change affecting voting in these areas can be made without approval of the Department of Justice or the U.S. District Court of the District of Columbia. Under the proposed extension of the law, the *effect* provision would apply even to laws enacted or actions taken, before 1965. It would apply nationwide, not just to the preclearance areas; if there is to be such a provision, it should apply to the whole nation.

But the *effect* rule would be wrong anywhere. It could easily be interpreted as requiring racial balance, or proportional representation. Minority voters might contend, for example, that a city that adopted at-large elections 100 years ago with no remote intention to discriminate was nevertheless discriminating against them because they were not represented on city council in proportion to their numbers in the city's population.

Virginia's 3d District Rep. Thomas J. Bliley Jr., who sought unsuccessfully to get the *effect* provision stricken from the bill, told his colleagues that if that provision becomes law, hundreds of towns and cities that have at-large elections could be brought into court and perhaps forced to adopt district elections.

Rep. M. Caldwell Butler of Virginia's 6th District, who waged a strong fight against oppressive provisions of the House bill, points out that under the *effect* rule, "every at-large electoral system in the country in which minority group candidates were not elected in proportion to their numbers would be suspect of being discriminatory." It could, he declares, be "a dangerous step towards establishing a legislative precedent for requiring that special groups within the national electorate be represented in proportion to their numbers."

Under the existing preclearance requirement, the city of Richmond, it will be recalled, had to abandon at-large councilmanic elections after it had annexed territory from Chesterfield County. The Department of Justice and the federal courts said that in the wake of the annexation, which brought many additional white persons into the city, at-large elections would dilute the black vote, so the city had to adopt a district system.

The *effect* provision in the extension bill would not apply only to the question of at-large vs. district elections, of course. Anything related to voting would be covered. Voting precincts which had been used for many years might be challenged as being so located as to discriminate against certain groups.

In a recent opinion in a Voting Rights Act case, U.S. Supreme Court Justices William H. Rehnquist and Lewis F. Powell Jr. called the preclearance provision of the act "unreasonably burdensome." They deplored "a system which places such discretionary authority in the hands of a few unelected federal officials [of the Department of Justice] who are wholly detached from the realities of the locality and the preferences of the local electorate."

The burden imposed by the Voting Rights Act could be significantly increased if the House's extention bill, or one like it, were approved by the Senate and became law. The Senate subcommittee on the Constitution today begins a series of hearings on the Voting Rights Act, and there are reasons to believe that the Senate will display the good judgment to come up with a more reasonable bill than the one approved by the House.

[From the Washington Post, Jan. 26, 1982]

VOTING RIGHTS: BE STRONG

Later today the president will be making final revisions of his State of the Union message. Among other subjects he is expected to announce the administration's position on extension of the Voting Rights Act. The attorney general's scheduled appearance before the Senate Judiciary Committee was postponed last week because that position had not yet been firmly established. Until the policy is set in type there is still time to urge the president to support the House-passed version of this bill.

The House bill reaffirms the nation's commitment to protect the most important right guarantee by the Constitution to all our citizens—the right to vote. When minorities are denied full participation in the electoral process representative government is flawed. The Voting Rights Act, passed originally in 1965, has been enormously successful. Voter regstration of minorities in the covered states has gone from 29 percent to over 50 percent in the last 17 years. The number of black elected officials in these same states has increased from 158 to 1,813 in the last 12 years. But as Professor Howard Ball's article on the opposite page demonstrates, efforts are still being made to subvert the law and dilute the voting power of minorities. The Voting Rights Act is the most powerful weapon available to defeat these efforts.

Controversy has centered around Section 2 of the bill, as passed by the House. This provision would allow courts to consider a number of factors, including discriminatory effects of a law, in deciding whether that law denies or abridges the right to vote. Opponents of the measure say this would require courts to strike down any voting system that didn't result in proportional representation. Not true. It would simply reinstate the standard used by the courts before the Supreme Court decision in *Mobile* v. *Bolden*, a 1980 case requiring proof that the drafters of the law in question intended to discriminate—a standard that is virtually impossible to meet since the legislators in question have all been dead for years.

In earlier cases the Supreme court had considered the totality of circumstances—including election results responsiveness of elected officials to the needs of minorities, nominating procedures and history of discrimination—to determine whether the challenged system really shut out racial minorities. In a 1971 case *Whitcomb* v. *Chavis*, the court upheld at-large elections in Indianapolis even though black voters strength was diluted, because there was not sufficient additional evidence of discrimination. Two years later, in *White* v. *Regester*, the court struck down a similar system in Texas because other evidence of discrimination was present. That is the standard to which the House-passed bill would return.

The president has received some very bad advice on civil rights matters from his associates in recent weeks. The same people who told him that it would be wise to restore tax-exempt status to segregated schools are urging him to oppose Section 2 as passed by the House. This bill was passed by a vote of 389 to 24. It has been cosponsored by 61 senators—enough even to stop a filibuster. The president should listen to his friends on the Hill and not just those in his own offices in deciding what message on civil rights he sends to the country tonight.

[Letter to the Editor of the Washington Post, Feb. 11, 1982]

THE VOTING RIGHTS ACT WORKS AS IS

By editorial comment ("Voting Rights: Be Strong," Jan. 26), The Post urged endorsement of the House-passed amendment to Section 2 of the Voting Rights Act, which changes the standard for determining a violation from the current "intent" test to one that requires only a showing of discriminatory "effect." Remarkably, the case made for this position was that the House bill merely seeks to reinstate the standard in use before the Supreme Court decision in *City of Mobile* v. *Bolden*.

In the 1980 *Mobile* decision, the Supreme Court considered Section 2 of the Voting Rights Act for the first time and concluded that proof of discriminatory "intent" is necessary to establish violations of that provision. Contrary to The Post's editorial, this decision signaled no change in the law.

The act itself is unambiguous on this point. As Justice Potter Stewart observed in *Mobile*, Section 2 was enacted to enforce the guaranty of the Fifteenth Amendment, and that constitutional provision has always required proof of discriminatory intent. Had Congress intended to include in Section 2 an "effects" test, it certainly knew how; in 1965, and again in 1970 and 1975, Congress explicitly included an "effects" test in Section 5 of the Voting Rights Act (applicable only to selected jurisdictions), but chose not to put the same standard in Section 2 (applicable nationwide).

Nor have the courts suggested otherwise. The Post points to two decisions (*Whitcomb v. Chavis* and *White v. Regester*) in support of its claim that an "effects" test did in fact exist in Section 2 before the *Mobile* decision. Neither case, however, even involved Section 2 of the Voting Rights Act; rather, they both concerned claims brought under the Equal Protection Clause of the Fourteenth Amendment. Moreover, even on the Fourteenth Amendment question, both *Whitcomb* and *White* tacitly recognized that proof of discriminatory intent is a necessary element of the constitutional offense. Justice Stewart's opinion in *Mobile* makes this clear, and The Post's editorial suggestion to the contrary is simply legally incorrect.

Also unsound is The Post's assertion that discriminatory intent is "virtually impossible" to prove. Several Supreme Court decisions have made it abundantly clear that a "smoking gun" in the form of incriminatory statements or documents has never been required. Intent in this area, as in any other, may be proved by circumstantial and indirect evidence. Notably, the equal protection clause of the Fourteenth Amendment, responsible for so many historic civil rights advances, has a similar test.

There is a general consensus in this country that the temporary provisions of the Voting Rights Act should be extended for an additional period of time. Congress should not, however, introduce uncertainty and confusion into what has been the most successful piece of civil rights legislation ever enacted by making so dramatic a change in its permanent provisions. Section 2 therefore should be retained without change.

WILLIAM BRADFORD REYNOLDS,
Assistant Attorney General (Civil Rights Division).

Washington.

[Editorial from the Washington Post, Feb. 11, 1982]

MR. REYNOLDS' LETTER

We offer you today a rather unusual discussion between Assistant Attorney General William Bradford Reynolds, whose letter appears elsewhere on this page, and ourselves. We say unusual because it is not simply an argument about principle or policy, on which reasonable people might disagree, but an argument about what a particular Supreme Court decision said. You would think there would not be much to argue about in that, and you would be wrong.

The opinion in question is *Mobile* v. *Bolden,* which was decided almost two years ago. We believe it set a new and unnecessarily tougher standard for the courts to use in determining whether a particular voting system is discriminatory. This is the view of civil rights advocates, who want to amend Section 2 of the voting rights bill now being considered by Congress in order to return to the pre-*Mobile* standard. Mr. Reynolds believes the *Mobile* case signaled no change and that the standard it set for proving discrimination is not difficult to meet. He therefore sees no need to amend the voting rights bill.

In a series of cases decided before *Mobile*—we mentioned two of them in our Jan. 26 editorial—the courts had looked at the way an electoral system was operating to see whether, for all practical purposes, minorities had been excluded from the process. For example, the fact that, in a county that is 40 percent black, not a single black had ever been elected to office would be some indication—though not conclusive proof—that a discriminatory system was in place. The courts also looked at other evidence, including the history of discrimination in the county, the operation of the nominating process and the responsiveness of elected officials to the needs of minorities. If the total picture presented by all these effects showed discrimination, then the electoral system was held to be invalid.

In *Mobile,* the Supreme Court held that it was not enough to show the discriminatory *effects* of the voting system. The plaintiffs in *Mobile* had to show that legislators who devised the voting system had a racially motivated *intent* to discriminate. Since the legislators in question had all been dead for many years, the plaintiffs could not meet the burden of proof, and they lost the case.

According to Justice Byron White, who wrote the majority opinion in an earlier voting case, the new and more difficult intent standard imposed by *Mobile* is "flatly inconsistent" with the earlier opinions. This is also the view of litigators who have argued these voting rights cases for years, according to their testimony before the Senate Judiciary Committee last week.

Is it difficult to prove that local legislators intended to discriminate when they devised a voting system? Yes. In the two recent cases where plaintiffs were successful, the "smoking gun" to which Mr. Reynolds refers was in fact found. In one case, members of the legislature themselves were available and willing to testify on the intentions of the lawmakers. In another case, an at-large voter system was adopted at exactly the same time as blacks became eligible to vote in the Democratic primary.

In most cases, however—especially those where the challenged system has been in place for many years—it is far more difficult to prove intent. Some cases that were decided in favor of plaintiffs before *Mobile* have already been reversed for failure to meet the new standard. Another, which was decided in favor of plaintiffs last March, will be argued before the Supreme Court later this month. Meanwhile, Congress has both the right and the obligation to direct the courts by statute to use the pre-*Mobile* standard in evaluating voting systems. Three hundred eighty-nine members of the House, by their recorded vote, and 63 senators, by their cosponsorship of the House-passed voting rights bill, have already done so.

[From the New York Times, Feb. 14, 1982]

MRS. CHISHOLM PLANS TO RETIRE FROM CONGRESS—CITES LOSSES BY LIBERALS AS FACTOR IN DECISION

(By Jane Perlez)

WASHINGTON, FEB. 10.—Representative Shirley Chisholm, Democrat of New York and the first black woman to win a seat in Congress, said today that she would not seek another term.

"I'm hanging up my hat," she said in an interview.

Mrs. Chisholm, who has represented the Bedford-Stuyvesant and Bushwick sections of Brooklyn since 1968, said her decision was motivated primarily by a desire to lead "a more private life."

But the 57-year-old Representative—a symbol of activist, liberal politics who is perhaps as well known nationally as she is in her district, the 12th—said that her retirement came at a time when the job had become more difficult.

ADMINISTRATION "NOT RESPONSIVE"

"We have an Administration that is not responsive to our constituency," she said in an interview in her office. "The constituency is going to be more voluble and demanding, and I find myself in a position where I can't help them."

Mrs. Chisholm said the defeat of liberal Democratic Senators in 1980 by conservative Republicans backed by right-wing political groups had been the major factor in breaking up the coalitions that she and others had created to push social legislation through Congress.

"I'm not going to lie," she said. "Many of us can't be effective at this time. It's not because we're not trying but because the gods seem to be against us."

"The coalitions are no longer here," she added. "Years ago, I could effect change because I could effect alliances. You had something to work with. There fear that seems to taunt the politican."

"Many of these Congressmen," she said, "see what happened on a statewide basis to these Senators and they see what could happen to them in their districts. Many of these guys are saying 'Shirley, self-preservation is the first order of the day.' "

Mrs. Chisholm has been considering her departure from Congress for more than a year. A month ago she told a university audience in Oklahoma that she might not run. She said she would release a formal statement—already rewritten four times, she said—"around Feb. 22."

Mrs. Chisholm said that she would have liked to leave Congress earlier, but that she felt a duty to stay on after the departures in 1978 of two other black women, Barbara Jordan of Texas and Yvonne Braithwaite Burke of California. There is one other black woman in the 97th Congress, Representative Cardiss Collins, Democrat of Illinois.

Mrs. Chisholm gained national attention in 1972 when she became the first black woman to run for the Presidency. While her pursuit of the Presidency was criticized by some as futile, she said she did it "as a catalyst."

"I do things that need to be done," she said, "that others don't have the guts, stamina or audacity to do."

She sits on the House Rules Committee and is secretary of the House Democratic Caucus, where in recent days she has been criticizing the leadership for what she calls the lack of "an alternative plan" to the Reagan budget.

PRESSURE FROM CAUCUS

Mrs. Chisholm said that even though it was virtually assured under the Federal Voting Rights Act that a black would be elected to succeed her, she had received "tremendous pressure" from the Congressional Black Caucus to remain in the House. "I have seniority and clout." she said.

She added that, while the political situation surrounding a successor "changed every day" it seemed likely that there would be a Democratic primary in her district between State Senator Major R. Owens and Brooklyn's deputy borough president, Edolphus Towns. She also said that a Democratic primary in the 14th District, represented by Frederick W. Richmond, was likely and would include State Senator Vander L. Beatty and Assemblyman Albert Vann.

What concerns her most, Mrs. Chisholm said, is the "quiescence of the people" in the face of unemployment, "distrust about Social Security" and increased military spending.

She attributes the lack of protest, in part, to the rise of "right-wing conservative groups who are supplemented by an evangelism that uses the media in a very effective way."

"They've paralyzed the people," she said of the evangelical preachers who appear on television. "They tend to use three words: family, morality, flag. They are key words to patriotic Americans. If they are encapsulated with the gospel, they tend to make you feel you can't go wrong if you follow the people who espouse the morality."

It will not be a complete retirement however. "My voice will still be heard but not as an elected official," she said "I want people to know that this is not a funeral, politically."

[From the New York Times, Feb. 18, 1982]

THE RIGHT TO VOTE MUST NOT BE A RIGHT TO WIN

To the Editor:

Frank R. Parker's Op-Ed article of Feb. 5, "Saving Voting Rights," is a sample of the sophistry by which the "effects" test in the new Voting Rights Act will be defended.

Contrary to Mr. Parker's suggestion, determination of intent is not a matter of psychoanalysis, nor is it particularly difficult. Juries decide every day of the week whether a killing was premeditated or done in some other state of mind, and they do so without telepathy or smoking guns.

Indeed, the very idea of "discrimination" is that of an act done by the will of a rational being. A person can no more inadvertently discriminate than he can inadvertently rob.

And Mr. Parker's disavowals notwithstanding, to forbid "discriminatory effects" does lead down the slippery slope to electoral quotas. Effects tests have certainly done so in employment, despite the promises of proponents of the Civil Rights Act.

To say that disproportional representation is not "in and of itself" a violation is a transparently weak safeguard, since any further factor, however insubstantial and unrelated to anyone's intent to discriminate, is now admissible as the decisive factor.

The right to vote is indeed our "crown jewel." It is the right not to be interfered with in the exercise of the franchise, and it has no reference to election results. If no one stops you from voting, your right is intact, even if your candidate, or the candidate representing your racial group, regularly loses.

This is merest common sense, as reaffirmed in Mobile v. Bolden. The change Mr. Parker advocates would turn the right to participate in an election into a presumptive right to win, and it would wholly pervert the democratic process.

MICHAEL LEVIN,
Professor of Philosophy, City College,
New York, Feb. 6, 1982.

To the Editor:

Frank Parker's article is typical of the desultory debate which has accompanied the attempt to amend Section 2 of the Voting Rights Act. The City of Mobile case has *not*, as Parker contends, "drastically altered" the intent standard of the current Section 2.

A successful claim under the 15th Amendment has always been conditioned upon a showing of discriminatory intent. Justice Stewart cited a venerable line of cases in support of this contention; these cases routinely invalidated voting practices or procedures that were racially neutral on their face but could be traced to a "discriminatory intent."

In no case did this entail the necessity of finding a "smoking gun" or the psychological analysis of legislators' intention. The argument that say it is necessary to do so has been created out of whole cloth by those who seek to create a radical new standard for the Voting Rights Act.

The great concern—and one which I share—is that the proposed amendment of the Voting Rights Act will lead to the requirement of proportional representation based on race. The language of the amendment seeks to dispel this fear, but its assurances ring hollow: lack of proportionality "in and of itself" does not constitute a violation.

In most recent years, emphasis has shifted from the issue of equal access to the ballot for racial minorities to that of equal results. The issue is no longer typically conceived of in terms of the right to vote but in terms of the right to an *effective* vote.

The old assumption that equal access to the ballot would ineluctably lead to political power for minorities has given way to the proposition that the political process must produce something more than equal access. The new demand is that the political process, regardless of equal access, must be made to yield equal results.

But if results become the new standard by which equal access to the political process is tested (as the amendment of Section 2 explicitly demands), then proportionality is inevitable. The argument, in its simplest form, presumes that a political process "equally open" to minorities will produce proportional results. When faced with a lack of proportional results, it is merely assumed that the political process is not "equally open."

All sides agree that the Voting Rights Act has been remarkably successful and that the imposition of the standard of racial proportionality would undo much of that success. The burden of proof rests upon those who would drastically alter the standards of intent to demonstrate more persuasively than they have that the amendment of Section 2 will not create the very thing that everyone wishes to avoid.

EDWARD J. ERLER,
Research Triangle Pk., N.C., Feb. 10, 1982.

[From the New York Times, Mar. 27, 1982]

THE VOTING RIGHTS ACT

(By William French Smith)[1]

WASHINGTON.—Congress is currently considering the critical question of whether to extend the Voting Rights Act of 1965. That act must be extended. And it should be extended in its tried-and-true form—neither contracted nor expanded to meet unsubstantiated contentions. That simple and straightforward position—to extend the act as it—is President Reagan's position.

Unfortunately, there have been disturbing efforts to derail the dispassionate consideration of this issue by branding anyone who does not support a bill recently passed by the House of Representatives as opposed to the Voting Rights Act itself. The House bill, however, is *not* the Voting Rights Act but something very different. The differences must be carefully considered on their merits.

The most drastic amendment to the existing and effective Voting Rights Act proposed by the House bill is in Section 2, a permanent provision requiring no change. As the 1980 Supreme Court decision in Mobile v. Bolden explained, a violation of Section 2 must be premised on proof of discriminatory intent. The House bill would overturn the subtle rule of law and provide that a violation may be established by proof of mere "results" or "effects"—the test now found only in the special pre-clearance provisions of Section 5.

When it enacted the effects test for Section 5 in 1965, Congress applied it on a temporary basis, only to election law changes, and only to selected jurisdictions with a clear history of voting abuses. The House proposal to amend Section 2, however, would establish this test on a permanent basis, apply it to all existing election systems and practices as well as proposed changes, and extend it nationwide. It would do so without any evidence of abuses to justify such a dramatic change. Even the House report itself recognized that "no specific evidence of voting discrimination in areas outside those presently covered was presented."

The effects test in the House bill rather than focusing on intent as in the current law, would focus on election results. The test would be triggered whenever election results did not mirror the population mix of a particular community, and could gradually lead to a system of proportional representation based on race or minority language status—essentially a quota system for electoral politics. Elections across the nation at every level of government—from school boards and county commissions to legislatures—could be disrupted by litigation.

More fundamentally, a system of proportional representation based on race is inconsistent with the democratic traditions of our pluralistic society. The House bill is based on and would foster the abhorrent notion that blacks can only be represented by blacks and whites can only be represented by whites. As Prof. William Van Alstyne of Duke University has noted, "The amendment must invariably operate . . . to create racially defined wards throughout much of the nation and to compel the worst tendencies toward race-based allegiances and divisions."

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[1] William French Smith is Attorney General of the United States.

Supporters of the House bill are quick to point to a disclaimer clause that provides that the failure to achieve proportional representation shall not, "in and of itself," constitute a violation. This clause would only come into play, however, after election systems had been restructured to guarantee as nearly as possible that proportional representation would result. If, once this was done, proportional representation was not achieved, then and only then would the disclaimer clause preclude the finding of a violation. The clause simply would not prevent drastic changes in election systems across the country to facilitate attainment of proportional racial representation.

Proponents of the House bill claim that an effects test is necessary because intent is "impossible" or "extremely difficult" to prove. This is simply false. The Supreme Court has made clear, on several occasions, that a "smoking gun" is not required to prove intent. Circumstantial and indirect evidence—including evidence of effects—can be relied upon in proving a violation. The Justice Department, for example, just recently intervened in a redistricting case in New Mexico, maintaining that discriminatory intent can be proved in that instance.

Justice Potter Stewart demonstrated in his scholarly opinion in Mobile v. Bolden that Section 2 was drafted to enforce the protection of the right to vote in the 15th Amendment, which has always required proof of intent. The intent test is the rule in the civil rights area, not the exception. The equal protection clause of the 14th Amendment, for example, under which so many historic civil rights advances have been made, has the same intent test. As former judge and Attorney General Griffin Bell has written to the Senate subcommittee considering the question, overruling the *Mobile* decision by statute would be "an extremely dangerous course of action under our form of government."

This Administration wholeheartedly supports a 10-year extension of the Voting Rights Act in its present form. The act is not broken, so there is no need to fix it. It should be extended as is.

[From the Washington Post, Mar. 29, 1982]

Voting Rights Act: Extend It as Is

(By William French Smith)[1]

On March 20, The Post published the latest in a confusing series of editorials on the appropriate test for challenging election systems under Section 2 of the Voting Rights Act. The existing act, which the Reagan administration believes should be extended, requires proof of intent to discriminate. A bill that has passed the House, however, would *change* the Voting Rights Act and focus not on intent to discriminate but on "effects" or "results." Numerous authorities and commentators have expressed deep concern that a "results" test could gradually impose a system of proportional representation based on race—a quota system for electoral politics. Judging by its own editorials, the response of The Post to this concern is: yes, no, maybe.

In its April 1980 decision in *Mobile v. Bolden*, the Supreme Court explained that Section 2 of the Voting Rights Act required proof of discriminatory intent. In that case, Justice Potter Stewart warned that the theory of the dissenting opinion, which embraced the results test, "appears to be that every political group, or at least every such group that is in the minority, has a federal constitutional right to elect candidates in proportion to its numbers."

The Post agreed with Justice Stewart's concern. On April 28, 1980, it concluded that the court was correct to reject challenges based on the results test. "By opting for intent," The Post reasoned, the court "has . . . avoided the logical terminal point of those challenges: that election district lines must be drawn to give proportional representation to minorities."

On Dec. 20, 1981, however, The Post changed its tune. It then supported the recently passed House bill to overturn *Mobile*. The Post rejected President Reagan's expressed concern that the results test could mandate proportional representation. It does not do so, but in any case, if proportional representation is the "logical" end of the results test, as The Post claimed, it is difficult to see how *any* disclaimer clause can be effective. The disclaimer either completely repeals the results test, or is meaningless. The Post nonetheless urged the president to "stop objecting and join the celebration."

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[1] The writer is attorney general of the United States.

On Jan. 26, 1982, The Post again editorialized in support of the House bill, claiming now that the bill would merely return the law to where it had been before *Mobile* change it—and citing cases that did not support that proposition. As The Post explained in yet another editorial, on Feb. 11, "we believe *Mobile* set a new and unnecessarily tougher standard for the courts to use in determining whether a particular system is discriminatory." The Post's original editorial—the one that agreed with the [*Mobile*] decision—somewhat oddly made no reference to this supposed "change" in the law. This suggests the new argument that *Mobile* changed the law is a hastily devised smokescreen to obscure the dramatic change proposed by the House bill.

In its latest editorial effort, on March 20, The Post brands my expression of concern that the results test could lead to proportional representation—its *own* argument at one point—as a "scare tactic." But, at the same time, it acknowledges that no one wants proportional representation and urges House bill supporters to "take whatever steps are necessary to reassure undecided senators" that proportional representation—according The Post, the "logical terminal point" of the results test—will not be compelled by tnat test. Perhaps The Post is beginning to recognize—as it once did—that the results test could lead to proportional representation. At least The Post is no longer facilely urging those with such concerns to "stop objecting and join the celebration."

The Post contends, however, that it is "almost impossible" to prove intent—even though the intent test is the standard test in civil rights law and many other areas as well, and is often met in the courts. According to The Post, the House bill "would allow the courts to look at a number of factors—history of discrimination, nominating procedures, election results, responsiveness of elected officials." As Justice Stewart made quite clear in *Mobile*, however, that is already true under the intent test. A "smoking gun" is not required and intent may be proved by indirect and circumstantial evidence, including evidence of the sort cited by The Post.

There is of course nothing wrong with the situation in which freely cast votes happen to elect minorities in proportion to the number of minorities in the electorate. What is disturbing, however, is a legislative effort to compel reorganization of electoral systems to *guarantee* such a result, on the basis of the abhorrent notions that blacks vote only for blacks and whites only for whites. As a society, we have moved well beyond that.

This administration fully supports extension of the Voting Rights Act—for an unprecedented 10 years. The Post, by contrast, supports the House bill and changes in the act. Congress has a choice. It can continue the protection of the most successful civil rights law ever enacted, or it can embark the nation on a perilous and divisive experiment with a new standard. The right to vote is too important to be subject to such experimentation.

We are pleased that The Post is urging Congress to take whatever steps are necessary to guarantee that proportional representation is not compelled. The best way to do that is to extend the act as is.

[From the New York Times, Mar. 19, 1982]

HARDBALL VOTING-RIGHTS HEARINGS

(By John H. Bunzel) [1]

President Reagan and most members of Congress favor extending the Voting Rights Act and maintaining its basic protections and guarantees. But many of the most enthusiastic friends of the law take issue with parts of the House-passed bill—for example, the bilingual requirements that would give assistance to certain minority groups, or the "bail out" standards by which an electoral jurisdiction can petition to remove itself from coverage but which many believe are almost impossible to satisfy.

What has been deeply disturbing, however, is to discover that some long-time supporters of the Voting Rights Act, who were invited to testify before the

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[1] Mr. Bunzel, former president of San Jose State University, is a senior research fellow at Stanford's Hoover Institution. He testified at the Senate Judiciary subcommittee's hearings in February.

House or Senate Judiciary subcommittees, were subjected to harassment and intimidation. They found themselves cast in the role of "enemies" by those who have consistently regarded any criticism of a very complex piece of legislation as outright opposition to the voting rights law—"code words," said the attorney for the NAACP Legal Defense Fund, "for not extending the act."

NO ONE WISHES TO BE TARGET

The message from the Leadership Conference on Civil Rights, an umbrella group of organizations that virtually managed the hearings process, was clear: Either you are actively with us in backing all the changes we want in "our bill" or you are actively against us. Faced with an "intimidating style of lobbying" (the words are those of Congressman Henry Hyde, the ranking Republican member of the House Judiciary subcommittee) that "limited serious debate and created a wave of apprehension among those who might have sincerely questioned some of the bill's language," a number of potential witnesses simply chose not to testify. "No one," observed Mr. Hyde, "wishes to be the target of racist characterizations."

There is more than a little evidence that the House subcommittee hearings were not always an unbiased forum. Of the 157 witnesses listed in the committee's report, only 12 expressed reservations about some of the contents of H.R. 3112. Of these, four are documented in the hearing record as having endured personal attacks, ridicule or harassment. Congressman Harold Washington accused two witnesses—one an emeritus college professor, the other a former city attorney—of coming before the committee with "unclean hands," meaning they could not be believed because their opposition put them in complicity with wrongdoers and racists.

A highly respected black civil-rights attorney Wilber Colom, told the House subcommittee of the pressure he encountered not to testify.

Mr. Colom. It stopped being pressure and started being intimidation at some point. Apparently someone had called most of my colleagues in Mississippi and I found my friends, my black friends, in the Republican Party, calling me up saying I was coming up here to testify against the Voting Rights Act. They just didn't believe it, and even went so far, my father—who's cochairman of the Democratic Party in one county—said that he had never heard such vicious things about his son.

Mr. Hyde. You were getting calls trying to persuade you not to come and testify?

Mr. Colom. Yes. . . . I do a great deal of civil rights litigation, but it was offensive to me when friends of mine called me and told me and say something about me that would be very offensive. It would be like someone, to use another example, a John Bircher or something, one of his friends called him up and said I understand you are a Communist.

In the Senate hearings, a principal focus has been on the new language in Section 2 of the House bill that changes the standard of having to show discriminatory intent to a new demand that the ballot box, although "equally open" to everyone, must yield equal results for certain racial minorities. Many of those who favor extending the bill fear that such a radically new electoral process will further proportional representation based on race. But, once again, as Sen. Orrin Hatch of the Judiciary subcommittee said during the hearings, people who were asked to testify "have expressed personally to me harassment about testifying and, frankly, have not been able to. I've been appalled by it."

ORDERED NOT TO COOPERATE

A recognized authority on the Voting Rights Act, scheduled to testify on the opening day of the hearings, had planned a research trip this fall to a Southern city. In preparation for the trip, she called an attorney (and a friend), who said he would help set up some interviews with politically active blacks. But a week later she was told that non-cooperation had been ordered by a leading strategist working closely with the Leadership Conference on Civil Rights, unless she backed out of the Senate hearings. It was also made clear that no one else active in civil rights in the South was likely to help her as long as she planned to testify. She withdrew as a witness.

The civil rights movement is a good cause. It has a lot of justice on its side. But no one invited to testify before Congress should have to bow to this sort of pressure. Apparently some civil-rights activists believe they are entitled to do whatever is necessary to get their bill passed. One Senate staffer privately admitted as much: "The ends justify the means, and we'll do whatever we have to do to get it through."

Perhaps they will. They may even win. But this is one victory that will come at a very high cost.

[From the New York Times]

VOTING RIGHTS

(By Howard Ball)[1]

STARKVILLE, MISS.—The 1965 Voting Rights Act is due to expire next year and already loud voices are heard calling for burial of this major civil rights law.

The legislation, enacted in response to bloodshed in Selma, Ala., represented a strong national effort to end racial discrimination in voting. The act was triggered in any state if less than 50 percent of its voting-age citizens were registered or voted in the 1964 Presidential election. Because nine states of the old Confederacy—Virginia, North Carolina, South Carolina. Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas—fall under the act's coverage Southern senators have strongly urged scuttling it. Strom Thurmond of South Carolina and Jesse Helms of North Carolina call the law unfair and biased against one region. They and other Southern politicians recommend outright burial or "nationwide coverage"—their shorthand term for removal of the triggering mechanism, which would have the effect of requiring that every voting law enacted in America be approved by the Justice Department, making enforcement impossible.

Supporters of the act, including all civil rights groups and such legislators as Senators Edward M. Kennedy, Daniel Patrick Moynihan and Barry Goldwater, as well as Don Edwards, chairman of the House Subcommittee on Civil and Constitutional Rights, are fighting hard to extend the existing law through 1992. They believe that the task of ensuring voter equality, especially in the South, has not yet been completed and that the Justice Department should continue the eradication of racial discrimination in voting.

President Reagan's position on extending the act appears unclear. On Sunday, he said he would support only nationwide coverage of it, but on Monday, at the convention of the National Association for the Advancement of Colored People, in Denever, he refused to comment on the Administration's position, saying that he needed additional time and information to study the issue. It is easy to understand his pained uncertainty. Administratively and politically, the law is complex; in its major sections, it calls for interdependent changes in local registration and voting processes, supervised by Federal officials.

Since 1965, more than 1.5 million Southern blacks have registered to vote. In Mississippi, where blacks constitute about 36 percent of the population, in 1964, 6.7 percent were registered; in 1981, nearly 70 percent were registered. A section of the act that suspends various tests and devices that frustrate registration, among them literacy tests and poll taxes, has been moderately successful. It is Section 5, the "preclearance" section, that is anathema to white officeholders. This section, put in because of Southern whites' horrid record in delaying implementation of integration orders, calls for preclearance of all voting changes by the Justice Department, or by the Federal District Court in Washington, D.C.

Section 5 gets to the heart of the problem. The objective of the law is defeated if 70 percent of the blacks in Mississippi are registered but if Indianola, Miss., can successfully annex, without preclearance, white subdivisions in order to ensure continuation of the city's white power base, as it did in 1966. It is defeated if, though many blacks in Jackson are registered, on the night before the 1978 election for a United States Senator, the all-white elections commission can successfully order the voting machines moved from one set of locations in black districts to others without informing the voters, much less clearing the change with the Justice Department.

Studies of implementation of the act indicate that Southern communities have flouted it with regularity by not reporting voting changes. Since there are, in the Justice Department, only about 15 staff members to implement it, the chances are good that a municipality, faced with an increase in the numbers of black citizens to the point where the blacks may win a mayoral race, will redistrict, or annex white subdivisions, or change from ward to at-large elections, or call for reregistration of voters, to prevent blacks from winning.

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[1] Howard Ball, professor of political science and chairman of that department at Mississippi State University, co-authored, with Dale Krane and Thomas Lauth, the forthcoming book "Compromised Compliance: Implementation of the 1965 Voting Rights Act."

Many Southern communities ignore the preclearance requirement. If there are 7,000 preclearances in a given year reported to the Justice Department, as there were in fiscal 1980, there are hundreds of substantive voting changes, not monitored by the department, that dilute blacks' votes in the South.

The act should not only not be junked, but implementation of it should be improved. An enlarged and better trained Justice Department staff is essenial. Improved monitoring by the department, by other Federal agencies, by state agencies, and by civil rights groups is necessary. Justice Department use of civil and criminal sanctions, authorized by the Voting Rights Act, may convince people to obey the law.

In coming months, Congress and the public must examine the reality of voting-rights enforcement in the South. Southern rhetoric should be ignored. The facts in such municipalities as Indianola and Jackson should be examined. Litigation in Federal courts challenging voting changes and elections in the South should be made known. A lot has changed in the South, but the job of ensuring voting equality is not yet finished.

[From the New York Times, Jan. 29, 1982]

WRONGED ON VOTING RIGHTS?

Ronald Reagan recoils from the suggestion that he's indifferent to the needs of black Americans. He's being wronged, he says. He was an outspoken supporter of civil rights even before it was called that. As Governor of California, he sought out blacks for appointed positions. And now, as President, he vigorously supports a 10-year extension of the Voting Rights Act.

In truth, Mr. Reagan's voting rights stance is late and equivocal, bordering on obstructionist. But it is not too late for him to demonstrate his commitment to better race relations and to the right to vote. No act of heroism is required. All Mr. Reagan needs to do is get out of the way.

The House voted 389 to 24 last fall to extend and strengthen the landmark Voting Rights Act of 1965. That bill has 62 Senate sponsors. Yet the President won't even say he'll sign it if it is passed; his Attorney General won't rule out recommending a veto.

If the President had supported a 10-year extension a year ago, it would probably be law by now. But then, such an extension seemed impossible because of objections to the law's critical Section Five. That requires affected states to get the Justice Department's approval for any election changes that affect minority voting power.

To get around the objections, the House devised an ingenious and laudable compromise. Affected jurisdictions could "bail out" of Section Five coverage by showing a recent history of nondiscrimination and positive steps to extend the ballot to minorities. But the Reagan Administration wants to weaken these bail-out standards.

There is a second controversy, involving challenges to election laws not covered by Section Five. An example is Mobile, Ala., and an at-large voting law much older than the Federal act. Blacks are one-third of the population but no black has ever been elected to the City Commission because its members are elected at large. Does that violate the Voting Rights Act? The House would say yes—if challengers can prove the election law was imposed "in a manner which results in a denial or abridgment" of any citizen's rights because of race.

That would put the voting rights law back where it seemed to be before the Supreme Court ruled in 1980 that conscious intent to discriminate racially had to be proved. For challengers to prove intent is so hard that cities like Mobile can cling to unjust systems, and escape the Federal law, precisely by *not* trying to change them.

Although the House had hearings on the subject all last year, Attorney General Smith had no advice to offer. But in a Senate hearing Wednesday he charged that the House bill would allow proof of a violation "on no more than a finding of disproportionate election results." Mr. Smith's charge is belied by the House bill's plain words: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation."

By raising a specter of "proportional representation" and racial quotas, the Reagan Administration creates confusion on a subject that most Congressmen understand clearly.

Bad enough that the Administration waited so long to enter the voting rights debate. Even now, its only contribution is obfuscation and dithering. That supports neither the right to vote nor Mr. Reagan's claim that he cares.

[From the New York Times, Mar. 19, 1982]

VOTING RIGHTS ARE NOT QUOTAS

The Reagan Administration is stepping up its opposition to a strengthened Voting Rights Act by playing on fears of racial quotas. Attorney General Smith told the United Jewish Appeal recently that if civil rights forces have their way, local governments will be forced to "mirror the racial or language make-up" of their constituencies.

This unworthy argument does not impress the Senate, where the voting bill continues to attract new sponsors. It is nonetheless discouraging because it portrays the Administration as needlessly hostile to valuable legislation.

No oppressive regime of judicially imposed quotas will spring forth if the Senate passes the voting rights extension that the House approved last fall, 389 to 24. Indeed, the bill specifically prohibits the use of only racial proportions to find a voting rights violation.

In amending Section 2 of the 1965 act, the House sought to put the law back where it was before 1980, when a deeply divided Supreme Court made discrimination harder to prove. The Court indicated that challengers to election statutes and practices in place before 1965 must prove an intent to discriminate. That is extremely difficult; the House said the legal burden was heavier than necessary.

Take Mobile, Ala., where the Court said proof of discriminatory *effect* was not enough. That city's black population is more than one-third of the total. But to the extent that blacks vote a group interest, they find it extremely difficult to gain influence—partly because the city's three commissioners are all chosen at large. Under the House bill such facts, though not alone decisive, could at least be part of a discrimination case.

As Senate hearings have made clear, the law could be invoked only with additional proof that the system operated to deny minorities political power. And the proper remedy would be an order requiring elections from properly apportioned districts—not districts that would be sure to elect blacks in proportion to population but only districts that do not strangle a cohesive minority's bid for influence.

From 1965 to 1980, when the law favored civil rights lawyers, no judgment of discrimination was entered without substantial evidence that minorities were systematically excluded from politics. In no case was a quota imposed.

By talking so anxiously about quotas at this point, the Administration unnecessarily inflames the debate over voting rights renewal. Given all the dismal signals to minorities from the White House and Justice Department, that is discouraging indeed. The Senate Judiciary subcommittee, which takes up the bill soon, should resist such ill-founded pleas for weakening amendments.

[From the New York Times, Apr. 13, 1982]

LATE AND LIMP ON VOTING RIGHTS

The Reagan Administration says it wants a flat 10-year extension of the Votings Rights Act and calls on critics, for a change, to praise its liberalism. Would that such praise were deserved. The same stance a year ago would have sent thrills through the civil rights movement, allaying some of the distrust felt by many black and Hispanic Americans.

But the Administration's position, at this late date and qualified by an announced willingness to weaken even a straight extension, looks more like a bow to political reality than a commitment to voting rights. The present stance threatens harm to a renewal bill that has widespread support in both houses of Congress.

Last year, when he could have been a leader, President Reagan told his Attorney General to take half a year studying this most effective of civil rights laws and deciding what to do about renewing key sections that expire this August. The House, recognizing the need for more timely action, went to work instead, holding hearings and, while the Administration was still deep in study, passed a new kind of voting law. The vote was an overwhelming, and bipartisan, 389 to 24.

Under the expiring 1965 act, states and counties with a history of discrimination may not change their election laws without advance approval. The House voted to make this provision of the law permanent, but with a way for covered jurisdictions to "bail out" when they could show excellent records on voting rights. And the House strengthened the section of the law governing private lawsuits attacking discriminatory voting systems that had been in place before 1965.

It is against the background of this progress that the Administration's willingness to continue the original act "as is" should be seen: not as willingness at all but as foot-dragging.

Why else would Senator Strom Thurmond, who has fought the act for years, endorse straight extension? His recent subcommittee vote helped make the extension bill, rather than the House bill, the pending business of his Judiciary Committee. And even "as is" is in jeopardy there. He wants to water down this bill, and Attorney General Smith has said he will cooperate on amendments.

One obvious danger is that a Senate-House conflict would expose the bill to delaying tactics that Senator Thurmond and others unfriendly to civil rights have used before. The House bill—the 199— model of voting rights legislation—already has the endorsement of 65 senators. It will be up to the Judiciary Committee, despite its chairman, to get the model bill to the floor and pass it.

[From the New York Times, Apr. 27, 1982]

A VOTING RIGHTS LETTER FOR CONGRESS

We have always, as you know, falsely pretended that our main purpose was to exclude the ignorant vote when, in fact, we were trying to exclude not the ignorant vote, but the Negro vote. . . . At present the masses of the colored race are indifferent to the right to vote and still more indifferent to the right to hold office. By adopting remedial measures now we shall cause no discontent, because of the present apathy of our colored citizens. This is fully recognized by all statesmen.

The year was 1909, the place Mobile, Ala., the writer Frederick Bromberg, a white State Senator. His letter to the local newspaper explained the origins of Alabama's post-Reconstruction election laws, which he had helped enact, and the plan for further measures to eliminate blacks from city and state politics.

White-only primaries, voter intimidation, literacy tests and poll taxes apparently were not enough. The chosen device was an at-large election for all three of Mobile's city commissioners, obliterating already meager black voting strength.

Today the Bromberg letter is the type of evidence minority plaintiffs must dig out of historical crannies and produce in court to prove discriminatory intent. It reflects the need for a stronger voting rights law.

The results of at-large systems have been painfully apparent to generations of blacks in Mobile and elsewhere. But only recently, after years of research and litigation, and on the basis of such items as the Bromberg letter, has a Federal judge found that the evidence of racial animus is sufficient to condemn Mobile's at-large election scheme.

Such elaborate proof is not always obtainable: officialdom has become more cautious and sophisticated, less blatant and candid than was Senator Bromberg. More important, such expensive and time-consuming proofs should not be necessary when the injury to minorities is so palpable.

The House has passed, and 65 senators have endorsed, a voting rights bill to permit court attacks when an election system shuts minorities out of a community's political life. The Reagan Administration opposes the change. The issue comes up today before the Senate Judiciary Committee. We urge the strong amendment. Letters like Senator Bromberg's are rarely written any more—or discovered.

CITY OF ROME ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 78-1840. Argued October 10, 1979—Decided April 22, 1980

In 1966, appellant city of Rome, Ga., made certain changes in its electoral system, including provisions for majority rather than plurality vote for each of the nine members of the City Commission; for three numbered posts within each of the three (reduced from nine) wards; and for staggered terms for the commissioners and for members of the Board of Education from each ward; and a requirement that members of the Board reside in the wards from which they were elected. In addition, the city made 60 annexations between November 1, 1964, and February 10, 1975. Section 5 of the Voting Rights Act of 1965 (Act) requires preclearance by the Attorney General of the United States or the United States District Court for the District of Columbia of any change in a "standard, practice, or procedure with respect to voting" made after November 1, 1964, by jurisdictions that fall within the coverage formula set forth in § 4 (b) of the Act. Section 5 further provides that the Attorney General may clear a voting practice only if it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Georgia was designated a covered jurisdiction in 1965, and the municipalities of that State accordingly must comply with the preclearance procedure. Eventually, after at first having failed to do so, Rome submitted the annexations and the 1966 electoral changes for preclearance, but the Attorney General declined to preclear the above-enumerated electoral changes, concluding that in a city such as Rome, in which the population is predominately white and racial bloc voting has been common, such electoral changes would deprive Negro voters of the opportunity to elect a candidate of their choice. The Attorney General also refused to preclear 13 of the 60 annexations, finding that the city had not carried its burden of proving that the disapproved annexations would not dilute the Negro vote. Subsequently, however, in response to the city's motion for reconsideration, the Attorney General agreed to preclear the 13 annexations for Board of Education elections but still refused to preclear them for City Commission elections. The city and two of its officials then filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking relief from the Act based on a variety of claims. A three-judge court rejected the city's arguments and granted summary judgment for the defendants, finding that the disapproved electoral changes and annexations, while not made for any discriminatory purpose, did have a discriminatory effect. The court refused to allow the city to "bail out" of the Act's coverage pursuant to § 4 (a), which allows a covered jurisdiction to escape § 5's preclearance requirement by bringing a declaratory judgment action and proving that no "test or device" has been used in the jurisdiction during the 17 years preceding the filing of the action "for the purpose or with the effect of denying or abridging the right to vote on account of race or color."

Held:

1. The city may not use § 4 (a)'s "bailout" procedure. In § 4 (a)'s terms, the issue depends on whether the city is either a "State with respect to which the determinations have been made" under § 4 (b) or a "political subdivision with respect to which such determinations have been made as a separate unit," and here the city fails to meet the definition of either term, since § 4 (b)'s coverage formula has never been applied to it. The city comes within the Act only because it is part of a covered State, and, hence, any "bailout" action to exempt the city must be filed by the State. Moreover, the legislative history precludes any argument that § 4 (a)'s "bailout" procedure, made available to a covered "State," was also implicitly made available to political units in the State. Pp. 162–169.

2. The 60-day period under the Attorney General's regulation requiring requests for reconsideration of his refusal to preclear electoral changes to be decided within 60 days of their receipt, commences anew when the submitting jurisdiction deems its initial submission on a reconsideration motion to be inadequate and decides to supplement it. Thus, here, where the city, less than 60 days prior to the Attorney General's decision on the city's reconsideration motion, submitted, on its own accord, affidavits to supplement the motion, the Attorney General's response was timely. A contrary ruling that the 60-day period ran continuously from the date of the initial submission of the reconsideration motion would mean that the Attorney General would, in some cases, be unable to give adequate consideration to materials submitted in piecemeal fashion, and might be able to respond only by denying the reconsideration motion. Pp. 170–172.

3. By describing in § 5 the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent. Furthermore, Congress recognized this when, in 1975, it extended the Act for another seven years. Pp. 172–173.

4. The Act does not exceed Congress' power to enforce the Fifteenth Amendment. Under § 2 of that Amendment, Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are "appropriate." Here, the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the Fifteenth Amendment's purposes, even if it is assumed that § 1 prohibits only intentional discrimination in voting. *South Carolina* v. *Katzenbach*, 383 U. S. 301. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create a risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact. Pp. 173–178.

5. The Act does not violate principles of federalism. Principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments "by appropriate legislation," *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, such Amendments being specifically designed as an expansion of federal power and an intrusion on state sovereignty. Accordingly, Congress had the authority to regulate state and local voting through the provisions of the Act. Pp. 178–180.

6. There is no merit to appellants' contention that the Act and its preclearance requirement had outlived their usefulness by 1975, when Congress extended the Act for another seven years. In view of Congress' considered determination that at least another seven years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination, the extension of the Act was plainly a constitutional method of enforcing the Fifteenth Amendment. Pp. 180–182.

7. Nor is there any merit to the individual appellants' argument that, because no elections have been held in appellant city since 1974, their First, Fifth, Ninth, and Tenth Amendment rights as private citizens of the city have been abridged. Under circumstances where, upon the Attorney General's refusal to preclear the electoral changes, the city could have conducted elections under its prior electoral scheme, the city's failure to hold elections can only be attributed to its own officials, and not the operation of the Act. Pp. 182–183.

8. The District Court's findings that the city had failed to prove that the 1966 electoral changes and the annexations disapproved by the Attorney General did not have a discriminatory effect are not clearly erroneous. Pp. 183–187.

450 F. Supp. 378 and 472 F. Supp. 221, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. BLACKMUN, J., *post*, p. 187, and STEVENS, J., *post*, p. 190, filed concurring opinions. POWELL, J., filed a dissenting opinion, *post*, p. 193. REHNQUIST, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 206.

Robert M. Brinson argued the cause for appellants. With him on the briefs were *William E. Sumner* and *Joseph W. Dorn.*

Deputy Solicitor General Wallace argued the cause for appellees. With him on the brief were *Solicitor General McCree, Assistant Attorney General Days, Elinor Hadley Stillman, Brian K. Landsberg, Walter W. Barnett, Mildred M. Matesich,* and *Mark L. Gross.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is the constitutionality of the Voting Rights Act of 1965 and its applicability to electoral changes and annexations made by the city of Rome, Ga.

I

This is a declaratory judgment action brought by appellant city of Rome, a municipality in northwestern Georgia, under the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. § 1973 *et seq.* In 1970 the city had a population of 30,759, the racial composition of which was 76.6% white and 23.4% Negro. The voting-age population in 1970 was 79.4% white and 20.6% Negro.

The governmental structure of the city is established by a charter enacted in 1918 by the General Assembly of Georgia.

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*Briefs of *amici curiae* urging reversal were filed by *A. F. Summer,* Attorney General, and *Jerris Leonard* for the State of Mississippi; and by *Ronald A. Zumbrun, John H. Findley,* and *Raymond M. Momboisse* for the Pacific Legal Foundation.

Before the amendments at issue in this case, Rome's city charter provided for a nine-member City Commission and a five-member Board of Education to be elected concurrently on an at-large basis by a plurality of the vote. The city was divided into nine wards, with one city commissioner from each ward to be chosen in the citywide election. There was no residency requirement for Board of Education candidates.

In 1966, the General Assembly of Georgia passed several laws of local application that extensively amended the electoral provisions of the city's charter. These enactments altered the Rome electoral scheme in the following ways:

(1) the number of wards was reduced from nine to three;

(2) each of the nine commissioners would henceforth be elected at-large to one of three numbered posts established within each ward;

(3) each commissioner would be elected by majority rather than plurality vote, and if no candidate for a particular position received a majority, a runoff election would be held between the two candidates who had received the largest number of votes;

(4) the terms of the three commissioners from each ward would be staggered;

(5) the Board of Education was expanded from five to six members;

(6) each Board member would be elected at large, by majority vote, for one of two numbered posts created in each of the three wards, with runoff procedures identical to those applicable to City Commission elections;

(7) Board members would be required to reside in the wards from which they were elected;

(8) the terms of the two members from each ward would be staggered.

Section 5 of the Voting Rights Act of 1965 requires preclearance by the Attorney General or the United States District Court for the District of Columbia of any change in a "standard, practice, or procedure with respect to voting," 42 U. S. C. § 1973c, made after November 1, 1964, by jurisdictions that fall within the coverage formula set forth in § 4 (b) of the Act, 42 U. S. C. § 1973b (b). In 1965, the Attorney General designated Georgia a covered jurisdiction under the Act, 30 Fed. Reg. 9897, and the municipalities of that State must therefore comply with the preclearance procedure, *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110 (1978)

It is not disputed that the 1966 changes in Rome's electoral system were within the purview of the Act. *E. g., Allen* v. *State Board of Elections,* 393 U. S. 544 (1969). Nonetheless, the city failed to seek preclearance for them. In addition, the city did not seek preclearance for 60 annexations made between November 1, 1964, and February 10, 1975, even though required to do so because an annexation constitutes a change in a "standard, practice, or procedure with respect to voting" under the Act, *Perkins* v. *Matthews,* 400 U. S. 379 (1971).

In June 1974, the city did submit one annexation to the Attorney General for preclearance. The Attorney General discovered that other annexations had occurred, and, in response to his inquiries, the city submitted all the annexations and the 1966 electoral changes for preclearance. The Attorney General declined to preclear the provisions for majority vote, numbered posts, and staggered terms for City Commission and Board of Education elections, as well as the residency requirement for Board elections. He concluded that in a city such as Rome, in which the population is predominately white and racial bloc voting has been common, these electoral changes would deprive Negro voters of the opportunity to elect a candidate of their choice. The Attorney General also refused to preclear 13 of the 60 annexations in question. He found that the disapproved annexations either contained predominately white populations of significant size or were near predominately white areas and were zoned for residential subdivision development. Considering these factors in light of Rome's at-large electoral scheme and history of racial bloc voting, he determined that the city had not carried its burden of proving that the annexations would not dilute the Negro vote.

In response to the city's motion for reconsideration, the Attorney General agreed to clear the 13 annexations for School Board elections. He reasoned that his disapproval of the 1966 voting changes had resurrected the pre-existing electoral scheme and that the revivified scheme passed muster under the Act. At the same time, he refused to clear the annexations for City Commission elections because, in his view, the residency requirement for City Commission contained in the pre-existing electoral procedures could have a discriminatory effect.

The city and two of its officials then filed this action, seeking relief from the Act based on a variety of claims. A three-judge court, convened pursuant to 42 U. S. C. §§ 1973b (a) and 1973c, rejected the city's arguments and granted summary judgment for the defendants. 472 F. Supp. 221 (DC 1979). We noted probable jurisdiction, 443 U. S. 914 (1979), and now affirm.

II

We must first address the appellants' assertion that, for two reasons, this Court may avoid reaching the merits of this action.

A

The appellants contend that the city may exempt itself from the coverage of the Act. To evaluate this argument, we must examine the provisions of the Act in some detail.

Section 5 of the Act requires that a covered jurisdiction that wishes to enact any "standard, practice, or procedure with respect to voting different from that in force or effect on

November 1, 1964," must seek preclearance from the Attorney General or the United States District Court for the District of Columbia. 79 Stat. 439, as amended, 42 U. S. C. § 1973c.[1]

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[1] In its entirety, § 5, as set forth in 42 U. S. C. § 1973c, provides:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the first sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the second sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the third sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objec-

Section 4 (a) of the Act, 79 Stat. 438, as amended, 42 U. S. C. § 1973b (a),[2] provides that the preclearance requirement of

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tion will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to re-examine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court."

[2] In its entirety, § 4 (a), as set forth in 42 U. S. C. § 1973b (a), provides:

"To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of seventeen years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after August 6, 1965, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless

§ 5 is applicable to "any State" that the Attorney General has determined qualifies under the coverage formula of § 4 (b), 42

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the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this paragraph, determining that denials or abridgments of the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section through the use of tests or devices have occurred anywhere in the territory of such plaintiff.

"An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section.

"If the Attorney General determines that he has no reason to believe that any such test or device has been used during the seventeen years preceding the filing of an action under the first sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section, he shall consent to the entry of such judgment.

"If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of an action under the second sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section, he shall consent to the entry of such judgment."

U. S. C. § 1973b (b),[3] and to "any political subdivision with respect to which such determinations have been made as a separate unit." As we have noted, the city of Rome comes within the preclearance requirement because it is a political unit in a covered jurisdiction, the State of Georgia. *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110 (1978).

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[3] In its entirety, § 4 (b), as set forth in 42 U. S. C. § 1973b (b), provides:

"The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

"A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

Section 4 (a) also provides, however, a procedure for exemption from the Act. This so-called "bailout" provision allows a covered jurisdiction to escape the preclearance requirement of § 5 by bringing a declaratory judgment action before a three-judge panel of the United States District Court for the District of Columbia and proving that no "test or device"[4] has been used in the jurisdiction "during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color." The District Court refused to allow the city to "bail out" of the Act's coverage, holding that the political units of a covered jurisdiction cannot independently bring a § 4 (a) bailout action. We agree.

In the terms of § 4 (a), the issue turns on whether the city is, for bailout purposes, either a "State with respect to which the determinations have been made under the third sentence of subsection (b) of this section" or a "political subdivision with respect to which such determinations have been made as a separate unit," the "determinations" in each instance being the Attorney General's decision whether the jurisdiction falls within the coverage formula of § 4 (b). On the face of the statute, the city fails to meet the definition for either term, since the coverage formula of § 4 (b) has never been applied to it. Rather, the city comes within the Act because it is part of a covered State. Under the plain language of the statute, then, it appears that any bailout action to exempt the city must be filed by, and seek to exempt all of, the State of Georgia.

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[4] Section 4 (c) of the Act, as set forth in 42 U. S. C. § 1973b (c), provides:

"The phrase 'test or device' shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

The appellants seek to avoid this conclusion by relying on our decision in *United States* v. *Board of Commissioners of Sheffield, Ala., supra.* That decision, however did not even discuss the bailout process. In *Sheffield,* the Court held that when the Attorney General determines that a State falls within the coverage formula of § 4 (b), any political unit of the State must preclear new voting procedures under § 5 regardless of whether the unit registers voters and therefore would otherwise come within the Act as a "political subdivision."[5] In so holding, the Court necessarily determined that the scope of §§ 4 (a) and 5 is "geographic" or "territorial," 435 U. S., at 120, 126, and thus that, when an entire State is covered, it is irrelevant whether political units of it might otherwise come under § 5 as "political subdivisions." 435 U. S., at 126–129.

Sheffield, then, did not hold that cities such as Rome are "political subdivisions" under §§ 4 and 5. Thus, our decision in that case is in no way inconsistent with our conclusion that, under the express statutory language, the city is not a "political subdivision" for purposes of § 4 (a) "bailout."

Nor did *Sheffield* suggest that a municipality in a covered State is itself a "State" for purposes of the § 4 (a) exemption procedure. *Sheffield* held that, based on the structure and purposes of the Act, the legislative history, and the contemporaneous interpretation of the Attorney General, the ambiguities of §§ 4 (a) and 5 should be resolved by holding that § 5's preclearance requirement for electoral changes by a covered "State" reached all such changes made by political units in that State. See 435 U. S., at 117–118. By contrast, in this case the legislative history precludes any argument that § 4 (a)'s bailout procedure, made available to a covered "State," was also implicitly made available to political units in the State. The House Commitee Report stated:

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[5] Section 14 (c)(2) of the Act, as set forth in 42 U. S. C. § 1973*l* (c)(2), provides:

"The term 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."

> "This opportunity to obtain exemption is afforded only to those States or to those subdivisions as to which the formula has been determined to apply as a separate unit; subdivisions within a State which is covered by the formula are not afforded the opportunity for separate exemption." H. R. Rep. No. 439, 89th Cong., 1st Sess., 14 (1965).

The Senate Committee's majority Report is to the same effect:

> "We are also of the view that an entire State covered by the test and device prohibition of section 4 must be able to lift the prohibition if any part of it is to be relieved from the requirements of section 4." S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, p. 16 (1965).

See also *id.*, at 21. Bound by this unambiguous congressional intent, we hold that the city of Rome may not use the bailout procedure of § 4 (a).[6]

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[6] We also reject the appellants' argument that the majority vote, runoff election, and numbered posts provisions of the city's charter have already been precleared by the Attorney General because in 1968 the State of Georgia submitted, and the Attorney General precleared, a comprehensive Municipal Election Code that is now Title 34A of the Code of Georgia. Both the relevant regulation, 28 CFR § 51.10 (1979), and the decisions of this Court require that the jurisdiction "in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act," *Allen* v. *State Board of Elections*, 393 U. S. 544, 571 (1969), and that the Attorney General be afforded an adequate opportunity to determine the purpose of the electoral changes and whether they will adversely affect minority voting in that jurisdiction, see *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110, 137–138 (1978). Under this standard, the State's 1968 submission cannot be viewed as a submission of the city's 1966 electoral changes, for, as the District

B

The appellants next argue that its electoral changes have been precleared because of allegedly tardy action by the Attorney General. On May 21, 1976, the city asked the Attorney General to reconsider his refusal to preclear the electoral changes and the 13 annexations. On July 13, 1976, upon its own accord, the city submitted two additional affidavits. The Attorney General denied the motion to reconsider on August 12, 1976.

Section 5 of the Act provides that the Attorney General must interpose objections to original submissions within 60 days of their filing.[7] If the Attorney General fails to make a timely objection, the voting practices submitted become fully enforceable. By regulation, the Attorney General has provided that requests for reconsideration shall also be decided within 60 days of their receipt. 28 CFR § 51.3 (d) (1979).[8] If in the present case the 60-day period for reconsideration is computed as running continuously from May 24, the date of the initial submission of the reconsideration motion, the period expired before the Attorney General made his August 12 response. In contrast, if the period is measured from July 14,

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Court noted, the State's submission informed the Attorney General only of "its decision to defer to local charters and ordinances regarding majority voting, runoff elections, and numbered posts," and "did not . . . submit in an 'unambiguous and recordable manner' all municipal charter provisions, as written in 1968 or as amended thereafter, regarding these issues." 472 F. Supp. 221, 233 (DC 1979).

[7] See n. 1, *supra.*

[8] This regulation provides:

"When the Attorney General objects to a submitted change affecting voting, and the submitting authority seeking reconsideration of the objection brings additional information to the attention of the Attorney General, the Attorney General shall decide within 60 days of receipt of a request for reconsideration (provided that he shall have at least 15 days following a conference held at the submitting authority's request) whether to withdraw or to continue his objection."

the date the city supplemented its request, the Attorney General's response was timely.

The timing provisions of both the Act and the regulations are silent on the effect of supplements to requests for reconsideration. We agree with the Attorney General that the purposes of the Act and its implementing regulations would be furthered if the 60-day period provided by 28 CFR § 51.3 (d) were interpreted to commence anew when additional information is supplied by the submitting jurisdiction on its own accord.

The logic of *Georgia* v. *United States,* 411 U. S. 526 (1973), indicates that the Government's approach fully comports with the Act and regulations. In that case, the Court examined a regulation of the Attorney General, 28 CFR § 51.18 (a), that provided that § 5's mandatory 60-day period for consideration of original submissions is tolled whenever the Attorney General finds it necessary to request additional information from the submitting jurisdiction. Under the regulation, the 60-day period commences anew when the jurisdiction in question furnishes the requested information to the Attorney General. The Court upheld the regulation, holding that it was "wholly reasonable and consistent with the Act." 411 U. S., at 541.

Georgia v. *United States* stands for the proposition that the purposes of the Act are furthered if, once *all* information relevant to a submission is placed before the Attorney General, the Attorney General is accorded the full 60-day period provided by law in which to make his "difficult and complex" decision, *id.,* at 540. It follows, then, that when the submitting jurisdiction deems its initial submission on a reconsideration motion to be inadequate and decides to supplement it, as the city of Rome did in the present case, the 60-day period under 28 CFR § 51.3 (d) is commenced anew. A contrary ruling would mean that the Attorney General would, in some cases, be unable to give adequate consideration to materials submitted in piecemeal fashion. In such circumstances, the

Attorney General might be able to respond only by denying the reconsideration motion. Such a result would run counter to the purposes of the Act and regulations, since it would penalize submitting jurisdictions that have legitimate reasons to file supplementary materials.[9]

III

The appellants raise five issues of law in support of their contention that the Act may not properly be applied to the electoral changes and annexations disapproved by the Attorney General.

A

The District Court found that the disapproved electoral changes and annexations had not been made for any discriminatory purpose, but did have a discriminatory effect. The appellants argue that § 5 of the Act may not be read as prohibiting voting practices that have only a discriminatory effect. The appellants do not dispute that the plain language of § 5 commands that the Attorney General may clear a practice only if it "does not have the purpose *and* will not have the effect of denying or abridging the right to vote on account of race or color." 42 U. S. C. § 1973c (emphasis added). By describing the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent. Our decisions have consistently interpreted § 5 in this fashion. *Beer* v. *United States,* 425 U. S. 130, 141 (1976); *City of Richmond* v. *United States,* 422 U. S. 358, 372 (1975); *Georgia* v. *United States, supra,* at 538; *Perkins* v. *Matthews,* 400 U. S. 379, 387, 388 (1971). Furthermore, Congress recognized that the Act prohibited both discriminatory purpose and effect when, in 1975, it extended the Act for another seven years. S. Rep. No. 94–295, pp. 15–16 (1975) (hereinafter S. Rep.); H. R. Rep. No. 94–196, pp. 8–9 (1975) (hereinafter H. R. Rep.).

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[9] Because of our resolution of this issue, we need not address the Government's contention that the 60-day period provided by 28 CFR § 51.3 (d) is permissive rather than mandatory.

The appellants urge that we abandon this settled interpretation because in their view § 5, to the extent that it prohibits voting changes that have only a discriminatory effect, is unconstitutional. Because the statutory meaning and congressional intent are plain, however, we are required to reject the appellants' suggestion that we engage in a saving construction and avoid the constitutional issues they raise. See, *e. g.*, *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 499–501 (1979); *id.*, at 508–511 (BRENNAN, J., dissenting). Instead, we now turn to their constitutional contentions.

B

Congress passed the Act under the authority accorded it by the Fifteenth Amendment.[10] The appellants contend that the Act is unconstitutional because it exceeds Congress' power to enforce that Amendment. They claim that § 1 of the Amendment prohibits only purposeful racial discrimination in voting, and that in enforcing that provision pursuant to § 2, Congress may not prohibit voting practices lacking discriminatory intent even if they are discriminatory in effect. We hold that, even if § 1 of the Amendment prohibits only purposeful discrimination,[11] the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect.

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[10] The Amendment provides:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

[11] For purposes of this case it is unnecessary to examine the various approaches expressed by the Members of the Court in *City of Mobile* v. *Bolden*, *ante*, p. 55, decided this day.

The appellants are asking us to do nothing less than overrule our decision in *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966), in which we upheld the constitutionality of the Act. The Court in that case observed that, after making an extensive investigation, Congress had determined that its earlier attempts to remedy the "insidious and pervasive evil" of racial discrimination in voting had failed because of "unremitting and ingenious defiance of the Constitution" in some parts of this country. *Id.,* at 309. Case-by-case adjudication had proved too ponderous a method to remedy voting discrimination, and, when it had produced favorable results, affected jurisdictions often "merely switched to discriminatory devices not covered by the federal decrees." *Id.,* at 314. In response to its determination that "sterner and more elaborate measures" were necessary, *id.,* at 309, Congress adopted the Act, a "complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant," *id.,* at 315.

The Court then turned to the question whether the Fifteenth Amendment empowered Congress to impose the rigors of the Act upon the covered jurisdictions. The Court examined the interplay between the judicial remedy created by § 1 of the Amendment and the legislative authority conferred by § 2:

> "By adding this authorization [in § 2], the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1. 'It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective.' *Ex parte Virginia,* 100 U. S. 339, 345. Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." 383 U. S., at 325–326 (emphasis in original).

Congress' authority under § 2 of the Fifteenth Amendment, we held, was no less broad than its authority under the Necessary and Proper Clause, see *McCulloch* v. *Maryland,* 4 Wheat. 316, 421 (1819). This authority, as applied by longstanding precedent to congressional enforcement of the Civil War Amendments, is defined in these terms:

> "'Whatever legislation is appropriate, that is, adapted to carry out the objects the [Civil War] amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.' *Ex parte Virginia,* 100 U. S. [339,] 345–346." *South Carolina* v. *Katzenbach, supra,* at 327.

Applying this standard, the Court held that the coverage formula of § 4 (b), the ban on the use of literacy tests and related devices, the requirement that new voting rules must be precleared and must lack both discriminatory purpose and effect, and the use of federal examiners were all appropriate methods for Congress to use to enforce the Fifteenth Amendment. 383 U. S., at 329–337.

The Court's treatment in *South Carolina* v. *Katzenbach* of the Act's ban on literacy tests demonstrates that, under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect. The Court had earlier held in *Lassiter* v. *Northampton County Board of Elections,* 360 U. S. 45 (1959), that the use of a literacy test that was fair on its face and was not employed in a discriminatory fashion did not violate § 1 of the Fifteenth Amendment. In upholding the Act's *per se* ban on such tests in *South Carolina* v. *Katzenbach,* the Court found no reason to overrule *Lassiter.* Instead, the Court recognized that the prohibition was an appropriate method of enforcing the Fifteenth Amendment because for many years most of the covered jurisdictions had imposed such tests to effect voting discrimination and the continued use of even nondiscriminatory, fairly administered literacy tests would "freeze the effect" of past discrimination by allowing white illiterates to remain on the voting rolls while excluding illiterate Negroes. *South Carolina* v. *Katzenbach, supra,* at 334. This holding makes clear that Congress may, under the authority of § 2 of the Fifteenth Amendment, prohibit state action that, though in itself not violative of § 1, perpetuates the effects of past discrimination.

Other decisions of this Court also recognize Congress' broad power to enforce the Civil War Amendments. In *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966), the Court held that legislation enacted under authority of § 5 of the Fourteenth Amendment[12] would be upheld so long as the Court could find that the enactment " 'is plainly adapted to [the] end' " of enforcing the Equal Protection Clause and "is not prohibited by but is consistent with 'the letter and spirit of the constitution,' " regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause. 384 U. S., at 651 (quoting *McCulloch* v. *Maryland, supra,* at 421). The Court stated that, "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." 384 U. S., at 651. Four years later, in *Oregon* v. *Mitchell,* 400 U. S. 112 (1970), the Court unanimously upheld a provision of the Voting Rights Act Amendments of 1970, Pub. L. 91–285, 84 Stat. 314, imposing a 5-year nationwide ban on literacy tests and similar requirements for registering to vote in state and federal elections. The Court concluded that Congress could rationally have determined that these provisions were appropriate methods of attacking the perpetuation of earlier, purposeful racial discrimination, regardless of whether the practices they prohibited were discriminatory only in effect. See 400 U. S., at 132–133 (opinion of Black, J.); *id.*, at 144–147 (opinion of Douglas, J.); *id.*, at 216–217 (opinion of Harlan, J.); *id.*, at 231–236 (opinion of Brennan, White, and Marshall, JJ.); *id.*, at 282–284 (opinion of Stewart, J., joined by Burger, C. J., and Blackmun, J.).[13]

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[12] Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are "appropriate," as that term is defined in *McCulloch* v. *Maryland* and *Ex parte Virginia,* 100 U. S. 339 (1880). In the present case, we hold that the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination,[14] it was proper to prohibit changes that have a discriminatory impact. See *South Carolina* v. *Katzenbach,* 383 U. S., at 335; *Oregon* v. *Mitchell,*

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[13] There was no opinion for the Court in this case. Mr. Justice Douglas expressed the view that the legislation in question was authorized under § 5 of the Fourteenth Amendment. 400 U. S., at 144–147. The other eight Members of the Court believed that the Congress had permissibly acted within the authority provided it by § 2 of the Fifteenth Amendment. 400 U. S., at 132–133 (opinion of Black, J.); *id.*, at 216 (opinion of Harlan, J.); *id.*, at 232–234 (opinion of Brennan, White, and Marshall, JJ.); *id.*, at 283 (opinion of Stewart, J., joined by Burger, C. J., and Blackmun, J.).

[14] See *South Carolina* v. *Katzenbach,* 383 U. S. 301, 335, and n. 47 (1966) (citing H. R. Rep. No. 439, 89th Cong., 1st Sess., 10–11 (1965); S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, pp. 8, 12 (1965)).

supra, at 216 (opinion of Harlan, J.). We find no reason, then, to disturb Congress' considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from "'undo[ing] or defeat[ing] the rights recently won' by Negroes." *Beer* v. *United States,* 425 U. S., at 140 (quoting H. R. Rep. No. 91-397, p. 8 (1969)).

C

The appellants next assert that, even if the Fifteenth Amendment authorized Congress to enact the Voting Rights Act, that legislation violates principles of federalism articulated in *National League of Cities* v. *Usery,* 426 U. S. 833 (1976). This contention necessarily supposes that *National League of Cities* signifies a retreat from our decision in *South Carolina* v. *Katzenbach, supra,* where we rejected the argument that the Act "exceed[s] the powers of Congress and encroach[es] on an area reserved to the States by the Constitution," 383 U. S., at 323, and determined that, "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting," *id.,* at 324. To the contrary, we find no inconsistency between these decisions.

In *National League of Cities,* the Court held that federal legislation regulating minimum wages and hours could not constitutionally be extended to employees of state and local governments. The Court determined that the Commerce Clause did not provide Congress the authority to enact legislation "directly displac[ing] the States' freedom to structure integral operations in areas of traditional governmental functions," 426 U. S., at 852, which, it held, included employer-employee relationships in programs traditionally conducted by States, *id.,* at 851-852.

The decision in *National League of Cities* was based solely on an assessment of congressional power under the Commerce Clause, and we explicitly reserved the question "whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as . . . § 5 of the Fourteenth Amendment." *Id.*, at 852, n. 17. The answer to this question came four days later in *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976). That case presented the issue whether, in spite of the Eleventh Amendment, Congress had the authority to bring the States as employers within the coverage of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, and to provide that successful plaintiffs could recover retroactive monetary relief. The Court held that this extension of Title VII was an appropriate method of enforcing the Fourteenth Amendment:

> "[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." *Fitzpatrick* v. *Bitzer, supra,* at 456.

We agree with the court below that *Fitzpatrick* stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments "by appropriate legislation." Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. Applying this principle, we hold that Congress had the authority to regulate state and local voting through the provisions of the Voting Rights

Act.[15] *National League of Cities,* then, provides no reason to depart from our decision in *South Carolina* v. *Katzenbach* that "the Fifteenth Amendment supersedes contrary exertions of state power," 383 U. S., at 325, and that the Act is "an appropriate means for carrying out Congress' constitutional responsibilities," *id.*, at 308.[16]

D

The appellants contend in the alternative that, even if the Act and its preclearance requirement were appropriate means of enforcing the Fifteenth Amendment in 1965, they had outlived their usefulness by 1975, when Congress extended the Act for another seven years. We decline this invitation to overrule Congress' judgment that the 1975 extension was warranted.

In considering the 1975 extension, Congress acknowledged that, largely as a result of the Act, Negro voter registration had improved dramatically since 1965. H. R. Rep., at 6; S. Rep., at 13. Congress determined, however, that "a bleaker side of the picture yet exists." H. R. Rep., at 7; S. Rep., at 13. Significant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions. In addition, though the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions. Congress concluded that, because minority political progress under the Act, though "undeniable," had been "modest and spotty," extension of the Act was warranted. H. R. Rep., at 7–11; S. Rep., at 11–19.

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[15] Indeed, *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976), strongly suggested this result by citing *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966), as one of several cases sanctioning "intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments, a phenomenon aptly described as a 'carv[ing] out' in *Ex parte Virginia*, [100 U. S. 339, 346 (1880)]." *Fitzpatrick* v. *Bitzer*, *supra*, at 455–456.

[16] See also *Katzenbach* v. *Morgan*, 384 U. S. 641, 646–647 (1966).

Congress gave careful consideration to the propriety of readopting § 5's preclearance requirement. It first noted that "[i]n recent years the importance of this provision has become widely recognized as a means of promoting and preserving minority political gains in covered jurisdictions." H. R. Rep., at 8; S. Rep., at 15. After examining information on the number and types of submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General, Congress not only determined that § 5 should be extended for another seven years, it gave that provision this ringing endorsement:

> "The recent objections entered by the Attorney General . . . to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism. As registration and voting of minority citizens increases [*sic*], other measures may be resorted to which would dilute increasing minority voting strength.
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> . . . . .
>
> "The Committee is convinced that it is largely Section 5 which has contributed to the gains thus far achieved in minority political participation, and it is likewise Sect[i]on 5 which serves to insure that that progress not be destroyed through new procedures and techniques. Now is not the time to remove those preclearance protections from such limited and fragile success." H. R. Rep., at 10–11.

See also S. Rep., at 15–19.

It must not be forgotten that in 1965, *95 years* after ratification of the Fifteenth Amendment extended the right to vote to all citizens regardless of race or color, Congress found that racial discrimination in voting was an "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina* v. *Katzenbach,* 383 U. S., at 309. In adopting the Voting Rights Act, Congress sought to remedy this century of obstruction by shifting "the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.,* at 328. Ten years later, Congress found that a 7-year extension of the Act was necessary to preserve the "limited and fragile" achievements of the Act and to promote further amelioration of voting discrimination. When viewed in this light, Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable. The extension of the Act, then, was plainly a constitutional method of enforcing the Fifteenth Amendment.

E

As their final constitutional challenge to the Act,[17] the individual appellants argue that, because no elections have been held in Rome since 1974, their First, Fifth, Ninth, and Tenth Amendment rights as private citizens of the city have been abridged. In blaming the Act for this result, these appellants identify the wrong culprit. The Act does not restrict private political expression or prevent a covered jurisdiction from holding elections; rather, it simply provides that elections may be held either under electoral rules in effect on November 1, 1964, or under rules adopted since that time that have been properly precleared. When the Attorney General refused to preclear the city's electoral changes, the city had the authority to conduct elections under its electoral scheme in effect on

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[17] We do not reach the merits of the appellants' argument that the Act violates the Guarantee Clause, Art. IV, § 4, since that issue is not justiciable. See, *e. g., Baker* v. *Carr,* 369 U. S. 186 (1962).

November 1, 1964. Indeed, the Attorney General offered to preclear any technical amendments to the city charter necessary to permit elections under the pre-existing scheme or a modification of that scheme consistent with the Act. In these circumstances, the city's failure to hold elections can only be attributed to its own officials, and not to the operation of the Act.

IV

Now that we have reaffirmed our holdings in *South Carolina* v. *Katzenbach* that the Act is "an appropriate means for carrying out Congress' constitutional responsibilities" and is "consonant with all . . . provisions of the Constitution," 383 U. S., at 308, we must address the appellants' contentions that the 1966 electoral changes and the annexations disapproved by the Attorney General do not, in fact, have a discriminatory effect. We are mindful that the District Court's findings of fact must be upheld unless they are clearly erroneous.

A

We conclude that the District Court did not clearly err in finding that the city had failed to prove that the 1966 electoral changes would not dilute the effectiveness of the Negro vote in Rome.[18] The District Court determined that racial bloc voting existed in Rome. It found that the electoral changes from plurality-win to majority-win elections, numbered posts, and staggered terms, when combined with the presence of racial bloc voting and Rome's majority white population and at-large electoral system, would dilute Negro voting strength. The District Court recognized that, under the pre-existing plurality-win system, a Negro candidate would have a fair opportunity to be elected by a plurality of the vote if white citizens split their votes among several white candidates and Negroes engage in "single-shot voting" in his favor.[19] The 1966 change to the majority vote/runoff election scheme significantly decreased the opportunity for such a Negro candidate since, "even if he gained a plurality of votes in the general election, [he] would still have to face the runner-up white candidate in a head-to-head runoff election in which, given bloc voting by race and a white majority, [he] would be at a severe disadvantage." 472 F. Supp., at 244 (footnotes omitted).[20]

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[18] Under § 5, the city bears the burden of proving lack of discriminatory purpose and effect. *Beer* v. *United States,* 425 U. S. 130, 140–141 (1976); *Georgia* v. *United States,* 411 U. S. 526, 538 (1973); *South Carolina* v. *Katzenbach,* 383 U. S., at 335.

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[19] Single-shot voting has been described as follows:

"Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates." U. S. Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206–207 (1975).

[20] The District Court found that Rome's Negro citizens believed that a Negro will never be elected as long as the city's present electoral system remains in effect. 472 F. Supp., at 226. Only four Negroes have ever sought elective office in Rome, and none of them was elected. The campaign of the Reverend Clyde Hill, who made the strongest showing of the four, indicates both the presence of racial bloc voting in the city and the dilutive effect of the majority vote/runoff election scheme adopted in 1966. The city's elections were operated under that scheme when Rev. Hill ran for the Board of Education in 1970. With strong support from the Negro community, Rev. Hill ran against three white opponents and received 921 votes in the general election, while his opponents received 909, 407, and 143 votes, respectively. Rev. Hill, then, would have been elected under the pre-1966 plurality-win voting scheme. Under the majority-win/runoff election provisions adopted in 1966, however, a runoff election was held, and the white candidate who was the runner-up in the general election defeated Rev. Hill by a vote of 1409–1142.

The District Court's further conclusion that the city had failed to prove that the numbered posts, staggered terms, and Board of Education residency provisions would not have the effect of forcing head-to-head contests between Negroes and whites and depriving Negroes of the opportunity to elect a candidate by single-shot voting, *id.*, at 245, is likewise not clearly erroneous.[21] The District Court's holdings regarding all of the 1966 electoral changes are consistent with our statement in *Beer* v. *United States*, 425 U. S., at 141, that "the purpose of § 5 has always been to insure that no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral [process]."

B

The District Court also found that the city had failed to meet its burden of proving that the 13 disapproved annexations did not dilute the Negro vote in Rome. The city's argument that this finding is clearly erroneous is severely undermined by the fact that it failed to present any evidence shedding meaningful light on how the annexations affected the vote of Rome's Negro community.

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[21] In so holding, the District Court relied on this analysis by the United States Commission on Civil Rights:

"'There are a number of voting rules which have the effect of frustrating single-shot voting. . . . [I]nstead of having one race for four positions, there could be four races, each for only one position. Thus for post no. 1 there might be one black candidate and one white, with the white winning. The situation would be the same for each post, or seat—a black candidate would always face a white in a head-to-head contest and would not be able to win. There would be no opportunity for single-shot voting. A black still might win if there were more than one white candidate for a post, but this possibility would be eliminated if there was also a majority requirement.

"'[Second,] each council member might be required to live in a separate district but with voting still at large. This—just like numbered posts—separates one contest into a number of individual contests.

"'[Third,] the terms of council members might be staggered. If each member has a 4-year term and one member is elected each year, then the opportunity for single-shot voting will never arise.'" 472 F. Supp., at 244, n. 95 (quoting U. S. Commission on Civil Rights, *supra* n. 19, at 207–208).

Because Rome's failure to preclear any of these annexations caused a delay in federal review and placed the annexations before the District Court as a group, the court was correct in concluding that the cumulative effect of the 13 annexations must be examined from the perspective of the most current available population data. Unfortunately, the population data offered by the city was quite uninformative. The city did not present evidence on the current general population and voting-age population of Rome, much less a breakdown of each population category by race.[22] Nor does the record reflect current information regarding the city's registered voters. The record does indicate the number of Negro and white registered voters in the city as of 1975, but it is unclear whether these figures included persons residing in the annexed areas in dispute.

Certain facts are clear, however. In February 1978, the most recent date for which any population data were compiled, 2,582 whites and only 52 Negroes resided in the disapproved annexed areas. Of these persons, 1,797 whites and only 24

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[22] In *City of Richmond* v. *United States,* 422 U. S. 358 (1975), and *City of Petersburg* v. *United States,* 354 F. Supp. 1021 (DC 1972), summarily aff'd, 410 U. S. 962 (1973), evidence of the racial composition of the general population was used to assess the impact of annexations on the importance of the Negro vote in the community. This information, when coupled with data on the racial composition of the community's voting-age population, provides more probative evidence in such cases than does voter registration data, which may perpetuate the effects of prior discrimination in the registration of voters, *Ely* v. *Klahr,* 403 U. S. 108, 115, n. 7 (1971); *Burns* v. *Richardson,* 384 U. S. 73, 92–93 (1966), or reflect a belief among the Negro population that it cannot elect a candidate of its choice, cf. n. 20, *supra.* Current voting-age population data are probative because they indicate the electoral potential of the minority community.

Negroes were of voting age, and 823 whites and only 9 Negroes were registered voters. We must assume that these persons moved to the annexed areas from outside the city, rather than from within the preannexation boundaries of the city, since the city, which bore the burden of proof, presented no evidence to the contrary.

The District Court properly concluded that these annexations must be scrutinized under the Voting Rights Act. See *Perkins* v. *Matthews,* 400 U. S., at 388–390. By substantially enlarging the city's number of white eligible voters without creating a corresponding increase in the number of Negroes, the annexations reduced the importance of the votes of Negro citizens who resided within the preannexation boundaries of the city. In these circumstances, the city bore the burden of proving that its electoral system "fairly reflects the strength of the Negro community as it exists after the annexation[s]." *City of Richmond* v. *United States,* 422 U. S., at 371. The District Court's determination that the city failed to meet this burden of proof for City Commission elections was based on the presence of three vote-dilutive factors: the at-large electoral system, the residency requirement for officeholders, and the high degree of racial bloc voting. Particularly in light of the inadequate evidence introduced by the city, this determination cannot be considered to be clearly erroneous.

The judgment of the District Court is affirmed.

It is so ordered.

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion but write separately to state my understanding of the effect of the holding in Part IV–B. The Court there affirms, as not clearly erroneous, the District Court's determination that the city of Rome failed to meet its burden of disproving that the 13 disputed annexations had a discriminatory effect. That issue, for me, is close, but I accept the District Court's ruling. The holding, however, does seem to have the anomalous result of leaving the voters residing in those annexed areas within the jurisdiction of Rome's Board of Education, but outside the jurisdiction of its City Commission.* As the appellees point out, however, Brief for Appellees 40–42, affirmance of the District Court's holding does not preclude the city from altering this anomaly.

It seems significant to me that the District Court adopted the remedial device of conditioning its approval of the annexations on Rome's abandonment of the residency requirement for City Commission elections. It thus denied the city's motion for approval of the annexations "without prejudice to renewal . . . upon the undertaking of suitable action consistent with the views expressed herein." 472 F. Supp. 221, 249 (DC 1979). This remedial device, conditioning the approval of annexations on the elimination of pre-existing discriminatory aspects of a city's electoral system, was developed in *City of Petersburg* v. *United States,* 354 F. Supp. 1021 (DC 1972), summarily aff'd, 410 U. S. 962 (1973), and expressly approved by this Court in *City of Richmond* v. *United States,* 422 U. S. 358, 369–371 (1975).

I entertain some doubt about the District Court's apparent conclusion that the residency requirement for Commission elections, standing alone, would render the postannexation electoral system of Rome one that did not "fairly recogniz[e] the minority's political potential," within the meaning of *City of Richmond. Id.,* at 378. The discriminatory effect of a residency requirement in an at-large election system results from its necessary separation of one contest into a number of individual contests, thereby frustrating minority efforts to utilize effectively single-shot voting. See *ante,* at 185, n. 21.

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*The Attorney General, in response to the city's motion for reconsideration of its submissions, agreed to preclear the 13 annexations for purposes of Board of Education elections. That decision was based solely on the fact that there was no residency requirement for Board of Education elections under Rome's pre-1966 electoral rules. See *ante,* at 160, 162.

And in a city the size of Rome, one might reasonably conclude that a requirement that one Commission member reside in each of nine wards would have such an effect. The District Court failed to analyze, however, the impact of the Attorney General's preclearance of Rome's reduction of the number of wards in the city from nine to three. The potential for effective single-shot voting would not be frustrated by a requirement that three commissioners be elected from each of three wards, so long as candidates were not required to run for a particular "numbered post" within each ward. Given the Attorney General's preclearance of the reduction of the number of wards from nine to three, the latter requirement is one that the District Court should have considered in determining whether the presence of a residency requirement would necessarily lead to the conclusion that Rome's postannexation electoral system is one that does not fairly recognize the minority's political potential.

I do not dissent from the affirmance of the District Court's holding with respect to the annexations, however, because the appellees have conceded that Rome need not abandon its residency requirement in order to keep the annexed areas within the jurisdiction of the City Commission. Appellees state:

> "If the City wished to retain both a residency requirement and at-large elections, . . . it could couple its pre-1966 procedures with its subsequent shift to a system of electing three commissioners from each of three wards. (The Attorney General had not objected to the change from nine wards to three larger wards.) When candidates are running concurrently for three unnumbered positions in each of the three wards, without a majority-vote requirement, there can be no head-to-head contest, and single-shot voting by black voters would give them a chance to elect the candidate they supported." Brief for Appellees 41–42.

Thus, on the understanding that the Attorney General would not object to the District Court's approval of the annexations insofar as they expand the jurisdiction of the City Commission, if the city either eliminates the residency requirement and returns to a nine ward system, or retains the residency requirement and the three-ward system that has been in effect since 1966, I join in Part IV–B of the Court's opinion.

MR. JUSTICE STEVENS, concurring.

Although I join the Court's opinion, the dissenting opinions prompt me to emphasize two points that are crucial to my analysis of the case; both concern the statewide nature of the remedy Congress authorized when it enacted the Voting Rights Act of 1965. The critical questions are: (1) whether, as a statutory matter, Congress has prescribed a statewide remedy that denies local political units within a covered State the right to "bail out" separately; and (2) if so, whether, as a constitutional matter, such statewide relief exceeds the enforcement powers of Congress. If, as I believe, Congress could properly impose a statewide remedy and in fact did so in the Voting Rights Act, then the fact that the city of Rome has been innocent of any wrongdoing for the last 17 years is irrelevant; indeed, we may assume that there has never been any racial discrimination practiced in the city of Rome. If racially discriminatory voting practices elsewhere in the State of Georgia were sufficiently pervasive to justify the statewide remedy Congress prescribed, that remedy may be applied to each and every political unit within the State, including the city of Rome.

I

Section 5 of the Voting Rights Act imposes certain restrictions on covered States and their political subdivisions, as well as on political subdivisions in noncovered States that have been separately designated as covered by the Attorney General pursuant to § 4 (b) of the Act. Section 4 (a) of the Act permits both States and separately designated political subdivisions in noncovered States to bail out of § 5's restrictions by demonstrating that they have not engaged in racially discriminatory voting practices for a period of 17 years. In *United States* v. *Board of Commissioners of Sheffield, Ala.,* 435 U. S. 110, the Court construed the word "State" as used in §§ 4 (a) and 5 to include all political units within a State even though they did not satisfy the statutory definition of a "political subdivision,"[1] and even though that definition had been added to the statute for the express purpose of limiting coverage.[2]

My opinion that the *Sheffield* Court's construction of the Act was erroneous does not qualify the legal consequences of that holding. See *Dougherty County Board of Education* v. *White,* 439 U. S. 32, 47 (STEVENS, J., concurring).[3] Nor does it prevent me from joining the Court's holding today that a political unit within a covered State is not entitled to bail out under § 4 (a).[4] For both the plain language of the statute and its legislative history unambiguously indicate that only covered States and separately designated political subdivisions in noncovered States are entitled to take advantage of that provision. See § 4 (a) and H. R. Rep. No. 439, 89th Cong., 1st Sess., 14 (1965), quoted *ante*, at 169. The political subdivisions of a covered State, while subject to § 5's preclearance requirements, are not entitled to bail out in a piecemeal fashion; rather, they can only be relieved of their preclearance obligations if the entire State meets the conditions for a bailout.

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[1] Section 14 (c)(2) of the Act, as set forth in 42 U. S. C. § 1973*l* (c)(2), provides:

"The term 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."

[2] See 435 U. S., at 142–143 (STEVENS, J., dissenting).

[3] In any event, the city of Rome may be subject to § 5 even under the reasoning of my dissent in *Sheffield.* As noted above, political subdivisions (*i. e.,* counties and other subdivisions that register voters) in covered States are clearly subject to the restrictions of § 5. In this case the city of Rome registered voters from 1964 to 1969, when the responsibility was transferred to Floyd County, see Stipulation No. 5, App. 58. Thus, from 1965 to 1969, the city was clearly covered by the Act. Because it did not preclear the transfer of voting registration to the county, *ibid.,* it at least arguably remains a "political subdivision" for purposes of both §§ 4 (a) and 5.

[4] It should be noted that there is some tension between the Court's language in *Sheffield* and its statement today that *Sheffield* did not "suggest that a municipality in a covered State is itself a 'State' for purposes of

Given the Court's decision in *Sheffield* that all political units in a covered State are to be treated for § 5 purposes as though they were "political subdivisions" of that State, it follows that they should also be treated as such for purposes of § 4 (a)'s bailout provisions. Moreover, even without the *Sheffield* decision, it would be illogical to deny separate bailout relief to larger political units such as counties—which are clearly "political subdivisions" as that term is defined in § 14 (c)(2)—and to grant it to smaller units such as municipalities and school boards.

II

The second question is whether Congress has the power to prescribe a statewide remedy for discriminatory voting prac-

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the § 4 (a) exemption procedure." See *ante*, at 168. Compare the latter statement with, *e. g.*, 435 U. S., at 128, where the Court stated that it was "wholly logical to interpret 'State . . . with respect to which' § 4 (a) is in effect as referring to all political units within it." See also *id.*, at 129, n. 17:

> "Our Brother STEVENS' dissent misconceives the basis for the conclusion that § 5's terms are susceptible of an interpretation under which Sheffield is covered. We believe that the term 'State' can bear a meaning that includes all state actors within it and that, given the textual interrelationship between § 5 and § 4 (a) and the related purposes of the two provisions, such a reading is a natural one."

To the extent that the Court has disavowed the foregoing comments, I, of course, agree.

tices if it does not allow political units that can prove themselves innocent of discrimination to bail out of the statute's coverage. In Part III-B of its opinion, the Court explains why Congress, under the authority of § 2 of the Fifteenth Amendment, may prohibit voting practices that have a discriminatory effect in instances in which there is ample proof of a longstanding tradition of purposeful discrimination. I think it is equally clear that remedies for discriminatory practices that were widespread within a State may be applied to every governmental unit within the State even though some of those local units may have never engaged in purposeful discrimination themselves.[5] In short, Congress has the constitutional power to regulate voting practices in Rome, so long as it has the power to regulate such practices in the entire State of Georgia. Since there is no claim that the entire State is entitled to relief from the federal restrictions, Rome's separate claim must fail.

I therefore join the Court's opinion.

MR. JUSTICE POWELL, dissenting.

Two years ago this Court held that the term "State" in § 4 (a) of the Voting Rights Act includes all political subdivisions that control election processes, and that those subdivisions are subject to the requirement in § 5 of the Act that federal authorities preclear changes in voting procedures. *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110 (1978) (*Sheffield*). Today the Court concludes that those subdivisions are not within the term "State" when it comes to an action to "bail out" from the preclearance requirement. Because this decision not only conflicts with *Sheffield* but also raises grave questions as to the constitutionality of the Act, I dissent.

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[5] The same principle applies to a court's exercise of its remedial powers. Thus, in an antitrust action, a remedy may be appropriate even though it "curtail[s] the exercise of liberties that the [defendant] might otherwise enjoy." *National Society of Professional Engineers* v. *United States,* 435 U. S. 679, 697. Similarly, in constitutional cases, a court may impose a remedy that requires more of the defendant than the Constitution itself would require in the absence of any history of wrongdoing. See, *e. g., Houchins* v. *KQED, Inc.,* 438 U. S. 1, 40 (STEVENS, J., dissenting). The Court has recently applied this principle to school desegregation cases, holding that a systemwide remedy—as opposed to a remedy concentrating on specific instances of discrimination—may be justified by a prior history of pervasive, systemwide discrimination. *Columbus Board of Education* v. *Penick,* 443 U. S. 449; *Dayton Board of Education* v. *Brinkman,* 443 U. S. 526.

I

Although I dissent on statutory and constitutional grounds, the need to examine closely the Court's treatment of the Voting Rights Act is sharply illustrated by the facts of this case. In Rome, a city of about 30,000, approximately 15% of the registered voters are black. This case involves two types of local action affecting voting. First, in 1966 the Georgia Assembly established a majority vote requirement for the City Commission and the Board of Education, and reduced the number of election wards from nine to three. Under the new arrangement, three city commissioners and two members of the Board of Education are chosen from each ward for numbered posts.[1] Second, between 1964 and 1975 Rome completed 60 territorial annexations, 13 of which are at issue in this case. The annexations allegedly diluted the black vote in Rome by disproportionately adding white voters. But 9 of the 13 relevant tracts of land were completely unpopulated when they were taken over by the city. By 1978 the additional white voters in the annexed land had caused a net decline of 1% in the black share of Rome's electorate.[2]

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[1] As part of the package of revisions, the Assembly increased the Board of Education from five to six members, eased voter registration requirements, and shifted registration responsibility to the county. 472 F. Supp. 221, 224 (DC 1979).

[2] The statistics on this question are not altogether satisfactory, since the 1978 population of the annexed areas must be compared to 1975

There is substantial conflict between the ultimate ruling of the three-judge District Court in this case and its findings of fact. That court made a finding that Rome has not employed a "literacy test or other device . . . as a prerequisite to voter registration during the past seventeen years," and that "in recent years there have been no other direct barriers to black voting in Rome." 472 F. Supp. 221, 224, 225 (DC 1979). The court observed that white officials have encouraged blacks to run for office, that there was no evidence of obstacles to political candidacy by blacks, and that a recent black contender for the Board of Education narrowly lost a runoff with 45% of the vote (in a city where blacks make up only 15% of the voters). Although no black has been elected to the municipal government, the court stated that the "white elected officials of Rome . . . are responsive to the needs and interests of the black community," and actively seek black political support.[3] *Id.*, at 225. Indeed, the District Court concluded that in Rome "the black community, if it chooses to vote as a group, can probably determine the outcome of many if not most contests." *Ibid.*

Despite these findings, the District Court refused to approve the annexations or the changes in voting procedures. The court held that the city had not proved that the annexations and voting changes did not reduce the political influence of Rome's blacks. *Id.*, at 245, 247. I have many reservations about that conclusion. I note in particular that a black candidate running under the challenged election rules commanded

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voter registration totals. Given that 16.6% of the city's voters were black in 1975, that percentage drops only to 15.6% after adding the 823 white voters and 9 black voters who lived in the annexed areas in 1978. See Brief for Appellees 38, n. 26.

[3] The District Court also noted that the city has "made an effort to upgrade some black neighborhoods," has subsidized the transit system which has a predominantly black ridership, and has hired a number of blacks for skilled and supervisory positions in the municipal government. 472 F. Supp., at 225.

three times the share of votes that the black community holds. Moreover, nine of the annexations at issue were of vacant land and thus had no effect at all on voting when they occurred. Nevertheless, I need not consider whether the District Court's ruling on the evidence is clearly erroneous. Rather, I cite the apparent factual inconsistencies of the holding below because they highlight how far the courts, including this Court, have departed from the original understanding of the Act's purpose and meaning.[4] Against this background, I address the substantive questions posed by this case.

II

Under § 4 (a) of the Voting Rights Act a State or political subdivision can attempt to end its preclearance obligations through a declaratory judgment action (or "bailout") in the District Court for the District of Columbia. 42 U. S. C. § 1973b (a). Bailout must be granted if the District Court finds that in that jurisdiction no "test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color." *Ibid.* The District Court expressly found that the city of Rome meets this standard and that blacks participate actively in Rome's political life. See *supra,* at 195. These findings demonstrate that the city has satisfied both the letter and the spirit of the bailout provision. Nevertheless, the District Court held that as long as Georgia is covered by § 5 of the Act, the city of Rome may not alter any voting practice without the prior approval of federal authorities.[5]

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[4] The Court's opinion simply ignores the most relevant facts. In so doing, the Court averts its eyes from the central paradox of this case: Even though Rome has met every criterion established by the Voting Rights Act for protecting the political rights of minorities, the Court holds that the city must remain subject to preclearance.

[5] Section 5 permits two methods of preclearance. A local government may ask the District Court for the District of Columbia for a ruling that

The Court today affirms the decision of the District Court, and holds that no subdivision may bail out so long as its State remains subject to preclearance. This conclusion can be reached only by disregarding the terms of the statute as we have interpreted them before. Section 4 (a) makes bailout available to "such State or subdivision," language that refers back to the provision's ban on the use of literacy tests (i) "in any State" reached by § 4 (b) of the Act, or (ii) "in any political subdivision" which is covered "as a separate unit."[6] Because the entire State of Georgia is covered under § 4 (b), this case concerns the first category in that definition.[7] Thus the crucial language here, as in *Sheffield,* is § 4 (a)'s prohibition of tests or devices "in any State" covered under § 4 (b).

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the voting change is acceptable, or it may submit the change to the Attorney General for him to accept or reject within 60 days. 42 U. S. C. § 1973c. The administrative procedure is used almost exclusively, since it takes less time.

[6] Section 4 (a), as set forth in 42 U. S. C. § 1973b (a), provides in relevant part:

"To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device *in any State with respect to which the determinations have been made under the first two sentences of subsection* (*b*) *of this section or in any political subdivision with respect to which such determinations have been made as a separate unit,* unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by *such State or subdivision* against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color. . . ." (Emphasis supplied.)

[7] Under § 4 (b), a State or political subdivision is subject to the Act if the Director of the Census finds that less than 50% of the eligible population voted in the last Presidential election, and the Attorney General determines that a discriminatory "test or device" was maintained in the jurisdiction in 1964. Those determinations, which are unreviewable, trigger the application of the preclearance requirement of § 5. 42 U. S. C. §§ 1973b (b), 1973c.

The *Sheffield* Court emphasized the territorial content of this key phrase. The Court reasoned that by referring to discriminatory practices "in" a State, Congress extended the ban on tests and devices to all political subdivisions with any control over voting. 435 U. S., at 120. Since the same language in § 4 (a) also defines the applicability of § 5, the Court continued, subdivisions must also be subject to preclearance. Consequently, federal authorities now must review all changes in local voting rules and regulations in States covered by the Act. 435 U. S., at 126–127.

The availability of a bailout action is defined by exactly the same phrase that the Court interpreted in *Sheffield*. In the bailout context, however, the Court today finds that the language does not reach political subdivisions. The Court thus construes the identical words in § 4 (a) to have one meaning in one situation and a wholly different sense when applied in another context. Such a protean construction reduces the statute to irrationality.

This irrationality is evident in the contrast between the rights of localities like Rome that are in States covered by § 4 (b), and those of covered local governments that are located in States not covered by the Act. Twenty-eight subdivisions in the latter group have bailed out from the preclearance obligation in six separate actions.[8] Yet the only difference between those governments and the city of Rome is that the State in which Rome is located is itself subject to the Voting Rights Act. There is no reasoned justification for allowing a subdivision in North Carolina to bail out but denying a similar privilege to a subdivision in Georgia when both have been found to be in full compliance with the bailout criteria.

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[8] *Counties of Choctaw and McCurtain, Okla.* v. *United States*, C. A. No. 76-1250 (DC May 12, 1978) (two counties); *New Mexico, Curry, McKinley and Otero Counties* v. *United States*, C. A. No. 76-0067 (DC July 30, 1976) (three counties); *Maine* v. *United States*, C. A. No. 75-2125 (DC Sept. 17, 1976) (13 municipalities and 5 "plantations"); *Wake County, N. C.* v. *United States*, C. A. No. 1198-66 (DC Jan. 23, 1967) (one county); *Elmore County, Idaho* v. *United States*, C. A. No. 320-66 (DC Sept. 22, 1966) (one county); *Apache, Navaho and Coconino Counties, Ariz.* v. *United States*, 256 F. Supp. 903 (DC 1966) (three counties). Three counties in New York City bailed out in 1972, *New York* v. *United States*, C. A. No. 2419-71 (DC Apr. 13, 1972), but the bailout order was rescinded two years later after a District Court found that the State had conducted elections in English only, thereby

The District Court acknowledged, and the Court today does not deny, the "abstract force" of this argument. The argument nevertheless fails, according to the Court's opinion, for two reasons: (i) *Sheffield* "did not hold that cities such as Rome are 'political subdivisions' " or "States," but merely subjected such entities to the preclearance requirement of § 5; and (ii) congressional Reports accompanying the Voting Rights Act of 1965 state that bailout should not be available to a subdivision located in a State covered by the Act. *Ante,* at 168–169. Neither reason supports the Court's decision. That *Sheffield* did not identify cities like Rome as "States" or "political subdivisions" as defined by the Act does not answer the point that the construction of "State" in *Sheffield* should control the availability of bailout. Both in terms of logic and of fairness, if Rome must preclear it must also be free to bail out. Second, it is elementary that where the language of a statute is clear and unambiguous, there is no occasion to look at its legislative history. We resort to legislative materials only when the congressional mandate is unclear on its face.

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violating the Act. *New York* v. *United States,* C. A. No. 2419–71 (DC Jan. 18, 1974) (referring to *Torres* v. *Sachs,* C. A. No. 73–3921 (CES) (SDNY Sept. 27, 1973)), summarily aff'd, 419 U. S. 888 (1974).

Bailout was denied in one action involving a local subdivision, *Gaston County, N. C.* v. *United States,* 395 U. S. 285 (1969), and three were dismissed by stipulation of the parties, *Board of Commissioners, El Paso County, Colo.* v. *United States,* C. A. No. 77–0185 (DC No. 8, 1977); *Yuba County, Cal.* v. *United States,* C. A. No. 75–2170 (DC May 25, 1976); *Nash County, N. C.* v. *United States,* C. A. No. 1702–66 (DC Sept. 26, 1969).

Ex parte Collett, 337 U. S. 55, 61 (1949); *United States* v. *Oregon*, 366 U. S. 643, 648 (1961). Although "committee reports in particular are often a helpful guide to the meaning of ambiguous statutory language, even they must be disregarded if inconsistent with the plain language of the statute." *Gooding* v. *United States*, 416 U. S. 430, 468 (1974) (MARSHALL, J., dissenting).

After *Sheffield*, there can be little dispute over the meaning of "State" as used in § 4 (a): It includes all political subdivisions that exercise control over elections.[9] Accordingly, there is no basis for the Court's reliance on congressional statements that are inconsistent with the terms of the statute. If § 4 (a) imposes the burden of preclearance on Rome, the same section must also relieve that burden when the city can demonstrate its compliance with the Act's quite strict requirements for bailout.

III

There is, however, more involved here than incorrect construction of the statute. The Court's interpretation of § 4 (a) renders the Voting Rights Act unconstitutional as applied to the city of Rome. The preclearance requirement both intrudes on the prerogatives of state and local governments and abridges the voting rights of all citizens in States covered under the Act. Under § 2 of the Fifteenth Amendment, Congress may impose such constitutional deprivations only if it is acting to remedy violations of voting rights. See *South Carolina* v. *Katzenbach*, 383 U. S. 301, 327–328 (1966); *Katzenbach* v. *Morgan*, 384 U. S. 641, 667 (1966) (Harlan, J., dissenting). In view of the District Court finding that Rome has not denied or abridged the voting rights of blacks, the

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[9] This construction applies to political subdivisions defined by § 14 (c) (2) of the Act, 42 U. S. C. § 1973*l* (c)(2), as well as to governments like Rome that do not fall within that statutory definition. Thus, under *Sheffield*'s statutory interpretation, all subdivisions in States covered by the Act should be entitled to bail out. The constitutional analysis of Part III, *infra*, reaches the same conclusion.

Fifteenth Amendment provides no authority for continuing those deprivations until the entire State of Georgia satisfies the bailout standards of § 4 (a).[10]

When this Court first sustained the Voting Rights Act of 1965, it conceded that the legislation was "an uncommon exercise of congressional power." *South Carolina* v. *Katzenbach*, *supra*, at 334. The Court recognized that preclearance under the Act implicates serious federalism concerns. 383 U. S., at 324–327. As MR. JUSTICE STEVENS noted in *Sheffield*, the statute's "encroachment on state sovereignty is significant and undeniable." 435 U. S., at 141 (dissenting opinion).[11] That encroachment is especially troubling because it destroys local control of the means of self-government, one of the central values of our polity.[12] Unless the federal structure pro-

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[10] In view of the narrower focus of my approach to the statutory and constitutional issues raised in this case, I do not reach the broad analysis offered by MR. JUSTICE REHNQUIST's dissent.

[11] Other Justices have expressed the same concern. *E. g., South Carolina* v. *Katzenbach*, 383 U. S. 301, 358 (1966) (Black, J., concurring and dissenting); *Allen* v. *State Board of Elections*, 393 U. S. 544, 586, and n. 4 (1969) (Harlan, J., concurring in part and dissenting in part); see also *Georgia* v. *United States*, 411 U. S. 526, 545 (1973) (POWELL, J., dissenting).

In *National League of Cities* v. *Usery*, 426 U. S. 833, 856, n. 20 (1976), the Court noted that because political subdivisions "derive their authority and power from their respective States," their integrity, like that of the States, is protected by the principles of federalism.

[12] The federal system allocates primary control over elections to state and local officials. *Oregon* v. *Mitchell*, 400 U. S. 112, 125 (1970) (opinion of Black, J.); *id.*, at 201 (opinion of Harlan, J.); *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45, 50 (1959).

This Court has emphasized the importance in a democratic society of preserving local control of local matters. See *Milliken* v. *Bradley*, 418 U. S. 717, 744 (1974) (federal court control of local schools "would deprive the people of control of schools through their elected representatives"); *James* v. *Valtierra*, 402 U. S. 137, 143 (1971) (local referendum on public housing project "ensures that all the people of a community will have a voice in a decision which may lead to large expenditures . . . and to lower tax revenues"). Preservation of local control, naturally vides some protection for a community's ordering of its own democratic procedures, the right of each community to determine its own course within the boundaries marked by the Constitution is at risk. Preclearance also operates at an individual level to diminish the voting rights of residents of covered areas. Federal review of local voting practices reduces the influence that citizens have over policies directly affecting them, and strips locally elected officials of their autonomy to chart policy.

The Court in *South Carolina* v. *Katzenbach*, *supra*, did not lightly approve these intrusions on federalism and individual rights. It upheld the imposition of preclearance as a prophylactic measure based on the remedial power of Congress to enforce the Fifteenth Amendment. But the Court emphasized that preclearance, like any remedial device, can be imposed only in response to some harm. When Congress approved the Act, the Court observed, there was "reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act." 383 U. S., at 329. Since the coverage formula in § 4 (b) purported to identify accurately those jurisdictions that had engaged in voting discrimination, the imposition of preclearance was held to be justified "at least in the absence of proof that [the state or local government has] been free of substantial voting discrimination in recent years." 383 U. S., at 330.[13]

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enough, involves protecting the integrity of state and local governments. See *National League of Cities* v. *Usery*, *supra*, at 855; *Coyle* v. *Oklahoma*, 221 U. S. 559, 565 (1911).

[13] The Court found important confirmation of the rationality of the coverage formula in the fact that there was no evidence of "recent racial discrimination involving tests and devices" in States or subdivisions exempted from preclearance. 383 U. S., at 331.

This Court took a similar approach when it affirmed the temporary suspension of all literacy tests by Congress in 1970. *Oregon* v. *Mitchell*, *supra*. The entire Court agreed with Mr. Justice Black's view that

The Court in *South Carolina* v. *Katzenbach* emphasized, however, that a government subjected to preclearance could be relieved of federal oversight if voting discrimination in fact did not continue or materialize during the prescribed period.

> "Acknowledging the possibility of overbreadth, the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding [statutorily defined period]." *Id.*, at 331.

Although this passage uses the term "overbreadth" in an unusual sense, the point is clear. As long as the bailout option is available, there is less cause for concern that the Voting Rights Act may overreach congressional powers by imposing preclearance on a nondiscriminating government. Without bailout, the problem of constitutional authority for preclearance becomes acute.

The Court today decrees that the citizens of Rome will not have direct control over their city's voting practices until the entire State of Georgia can free itself from the Act's restrictions. Under the current interpretation of the word "State" in § 4 (a), Georgia will have to establish not only that it has satisfied the standards in § 4 (a), but also that each and every one of its political subdivisions meets those criteria. This outcome makes every city and county in Georgia a hostage to the errors, or even the deliberate intransigence, of a single sub-

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the congressional action was justified by the "long history of the discriminatory use of literacy tests to disfranchise voters on account of their race." 400 U. S., at 132. See *id.*, at 146 (opinion of Douglas, J.); *id.*, at 216, and n. 94 (opinion of Harlan, J.); *id.*, at 234–235 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *id.*, at 284 (opinion of STEWART, J.). That history supported temporary suspension of those few literacy tests still in use, see *id.*, at 147 (opinion of Douglas, J.), without providing any bailout-like option. In contrast, preclearance involves a broad restraint on all state and local voting practices, regardless of whether they have been, or even could be, used to discriminate.

division.[14] Since the statute was enacted, only one State has succeeded in bailing out—Alaska in 1966, and again in 1971.[15] That precedent holds out little or no hope for more populous States such as Georgia. Demonstrating a right to bailout in 1966 for Alaska's 272,000 people and 56 political subdivisions, or in 1971 for that State's 302,000 people and 60 subdivisions, is a far cry from seeking bailout now on behalf of Georgia's approximately 5 million people and 877 local governments.[16]

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[14] Tr. of Oral Arg. 38. The Court's position dictates this eccentric result by insisting that subdivisions in covered States can be relieved of preclearance only when their State bails out. In my view this also would cast serious doubt on the Act's constitutionality as applied to any State which could not bail out due to the failings of a single subdivision. A rational approach would treat the state and local governments independently for purposes of bailout. If subdivisions in Georgia were free to seek bailout on their own, then a bailout action by the State could properly focus on the State's voting policies. Then, if Georgia were entitled to bail out, preclearance would continue to apply to subdivisions that by their own noncompliance met the coverage criteria of § 4 (b). Of course, the situation would be different if the State had contributed, overtly or covertly, to the subdivision's failure to comply.

[15] *Alaska* v. *United States*, C. A. No. 101-66 (DC Aug. 17, 1966); *Alaska* v. *United States*, C. A. No. 2122-71 (DC Mar. 10, 1972). Alaska's 1971 suit was prompted by recoverage of the State under the Act in the 1970 extension. The 1975 extension of the Act also re-established coverage of Alaska, which filed but abandoned yet another bailout suit. *Alaska* v. *United States*, C. A. No. 78-0484 (DC May 10, 1979) (stipulated dismissal of action).

One other State—Virginia—has attempted to bail out under § 4 (a). *Virginia* v. *United States*, 386 F. Supp. 1319 (DC 1974), summarily aff'd, 420 U. S. 901 (1975). The court held that Virginia did not satisfy § 4 (a) because a state literacy test administered in some localities between 1963 and 1965 was discriminatory in the context of the inferior education offered to Virginia blacks in certain rural counties before that period.

[16] The Solicitor General states that Georgia has 159 counties, 530 municipalities, and 188 other subdivisions that now must preclear every voting change, no matter how irrelevant the change might be to discrimination in voting. App. to Brief for Appellees 1a.

Today's ruling therefore will seal off the constitutionally necessary safety valve in the Voting Rights Act.

The preclearance requirement enforces a presumption against voting changes by certain state and local governments. If that presumption is restricted to those governments meeting § 4 (b)'s coverage criteria, and if the presumption can be rebutted by a proper showing in a bailout suit, the Act may be seen, as the *South Carolina* v. *Katzenbach* Court saw it, as action by Congress at the limit of its authority under the Fifteenth Amendment. But if governments like the city of Rome may not bail out, the statute oversteps those limits. For these reasons, I would reverse the judgment of the District Court.[17]

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[17] On a practical level, the District Court argued that since more than 7,000 subdivisions currently are required to preclear voting changes, bailout suits by a small percentage of those subdivisions would swamp that court. 472 F. Supp., at 231–232. In view of the acknowledged difficulties that confront a local government in seeking bailout in the District of Columbia, it is by no means self-evident that the "floodgates" perceived by the court would ever open. Such suits, involving substantial expense as well as uncertainty, would not likely be initiated unless there were a substantial likelihood of success. Moreover, the court's argument ignores the procedures of a bailout suit. Section 4 (a) directs the Attorney General not to contest bailout if he finds that the state or local government has not used a discriminatory test or device over the preceding 17 years. 42 U. S. C. § 1973b (a). In fact, the Attorney General consented to bailout in the nine actions under § 4 (a) that have succeeded, while only three bailout suits have gone to trial. See nn. 8 and 15, *supra*. Thus the Department of Justice, not the courts, would shoulder much of the added burden that might arise from recognizing a bailout right for governments like the city of Rome. That burden could hardly be more onerous than the Attorney General's present responsibility for preclearing all voting changes in 7,000 subdivisions. In the first six months of 1979 over 3,200 such voting changes were submitted to the Attorney General, a rate of more than 25 per working day. Letter to Joseph W. Dorn from Drew S. Days III, Assistant Attorney General, Civil Rights Division, U. S. Department of Justice (Aug. 3, 1979), reprinted in App. to Brief for Appellants 1c.

These astonishing figures compare unfavorably with those cited by MR. JUSTICE STEVENS in his *Sheffield* dissent, where he questioned the efficacy of

IV

If there were reason to believe that today's decision would protect the voting rights of minorities in any way, perhaps this case could be viewed as one where the Court's ends justify dubious analytical means. But the District Court found, and no one denies, that for at least 17 years there has been no voting discrimination by the city of Rome. Despite this record, the Court today continues federal rule over the most local decisions made by this small city in Georgia. Such an outcome must vitiate the incentive for any local government in a State covered by the Act to meet diligently the Act's requirements. Neither the Framers of the Fifteenth Amendment nor the Congress that enacted the Voting Rights Act could have intended that result.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART joins, dissenting.

We have only today held that the city of Mobile does not violate the Constitution by maintaining an at-large system of electing city officials unless voters can prove that system is a product of purposeful discrimination. *City of Mobile* v. *Bolden, ante,* p. 55. This result is reached even though the black residents of Mobile have demonstrated that racial "bloc" voting has prevented them from electing a black representative to the city government. The Court correctly concluded that a city has no obligation under the Constitution

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the Attorney General's review of preclearance requests that then were arriving at the rate of only four a day. *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110, 147–148, and nn. 8, 10 (1978). See *Berry* v. *Doles*, 438 U. S. 190, 200–201 (1978) (POWELL, J., concurring in judgment). It hardly need be added that no senior officer in the Justice Department—much less the Attorney General—could make a thoughtful, personal judgment on an average of *25* preclearance petitions per day. Thus, important decisions made on a democratic basis in covered subdivisions and States are finally judged by unidentifiable employees of the federal bureaucracy, usually without anything resembling an evidentiary hearing.

to structure its representative system in a manner that maximizes the black community's ability to elect a black representative. Yet in the instant case, the city of Rome is prevented from instituting precisely the type of structural changes which the Court says Mobile may maintain consistently with the Civil War Amendments, so long as their purpose be legitimate, because Congress has prohibited these changes under the Voting Rights Act as an exercise of its "enforcement" power conferred by those Amendments.

It is not necessary to hold that Congress is limited to merely providing a forum in which aggrieved plaintiffs may assert rights under the Civil War Amendments in order to disagree with the Court's decision permitting Congress to straitjacket the city of Rome in this manner. Under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment, Congress is granted only the power to "enforce" by "appropriate" legislation the limitations on state action embodied in those Amendments. While the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government or of one of the States, it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities. *Marbury* v. *Madison,* 1 Cranch 137 (1803); *United States* v. *Nixon,* 418 U. S. 683 (1974). Today's decision is nothing less than a total abdication of that authority, rather than an exercise of the deference due to a coordinate branch of the government.

I

The facts of this case readily demonstrate the fallacy underlying the Court's determination that congressional prohibition of Rome's conduct can be characterized as enforcement of the Fourteenth or Fifteenth Amendment.[1] The three-judge District Court entered extensive findings of fact—facts which are conspicuously absent from the Court's opinion. The lower court found that Rome has not employed any discriminatory barriers to black voter registration in the past 17 years. Nor has the city employed any other barriers to black voting or black candidacy. Indeed, the court found that white elected officials have encouraged blacks to run for elective posts in Rome, and are "responsive to the needs and interests of the black community." The city has not discriminated against blacks in the provision of services and has made efforts to upgrade black neighborhoods.

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[1] The Voting Rights Act is generally viewed as an exercise of Fifteenth Amendment power. See *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966). Since vote "dilution" devices are in issue in this case, the rights

It was also established that although a black has never been elected to political office in Rome, a black was appointed to fill a vacancy in an elective post. White candidates vigorously pursue the support of black voters. Several commissioners testified that they spent proportionately more time campaigning in the black community because they "needed that vote to win." The court concluded that "blacks often hold the balance of power in Rome elections."

Despite this political climate, the Attorney General refused to approve a number of city annexations and various changes in the electoral process. The city sought to require majority vote for election to the City Commission and Board of Education; to create numbered posts and staggered terms for those elections; and to establish a ward residency requirement for Board of Education elections. In addition, during the years

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at stake are more properly viewed as Fourteenth Amendment rights. See *City of Mobile* v. *Bolden, ante,* p. 55. Nevertheless, this Court has upheld the constitutionality of the Act if it is applied to remedy violations of the Fourteenth Amendment. *Gaston County* v. *United States,* 395 U. S. 285, 290, n. 5 (1969). Moreover, the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive. See, *e. g., United States* v. *Guest,* 383 U. S. 745, 784 (1966) (opinion of BRENNAN, J.); *James* v. *Bowman,* 190 U. S. 127 (1903). For this reason, it is not necessary to differentiate between the Fourteenth and Fifteenth Amendment powers for the purposes of this opinion.

between 1964 and 1973, the city effected 60 annexations. Appellees concede that none of the annexations were sought for discriminatory purposes. All of the electoral changes and 13 of the annexations were opposed by the Attorney General on the grounds that their adoption would lessen the likelihood that blacks would be successful in electing a black city official, assuming racial-bloc voting on the part of both whites and blacks. Each of the changes was considered to be an impermissible "vote-dilution" device.

Rome sought judicial relief and the District Court found that the city had met its burden of proving that these electoral changes and annexations were *not* enacted with the purpose of discriminating against blacks. The changes were nevertheless prohibited because of their perceived disparate effect.[2]

II

The Court holds today that the city of Rome can constitutionally be compelled to seek congressional approval for most of its governmental changes even though it has not engaged in any discrimination against blacks for at least 17 years. Moreover, the Court also holds that federal approval can be constitutionally denied even after the city has proved that the changes are not purposefully discriminatory. While I agree with MR. JUSTICE POWELL's conclusion that requiring localities to *submit* to preclearance is a significant intrusion on local autonomy, it is an even greater intrusion on that autonomy to *deny* preclearance sought.

The facts of this case signal the necessity for this Court to carefully scrutinize the alleged source of congressional power to intrude so deeply in the governmental structure of the municipal corporations created by some of the 50 States. Section 2 of the Fifteenth Amendment and § 5 of the Fourteenth provide that Congress shall have the power to "enforce" § 1 "by appropriate legislation." Congressional power to prohibit the electoral changes proposed by Rome is dependent upon the scope and nature of that power. There are three theories of congressional enforcement power relevant to this case. First, it is clear that if the proposed changes would violate the Constitution, Congress could certainly prohibit their implementation. It has never been seriously maintained, however, that Congress can do no more than the judiciary to enforce the Amendments' commands. Thus, if the electoral changes in issue do not violate the Constitution, as judicially interpreted, it must be determined whether Congress could nevertheless appropriately prohibit these changes under the other two theories of congressional power. Under the second theory, Congress can act remedially to enforce the judicially established substantive prohibitions of the Amendments. If not properly remedial, the exercise of this power could be sustained only if this Court accepts the premise of the third theory that Congress has the authority under its enforcement powers to determine, without more, that electoral changes with a disparate impact on race violate the Constitution, in which case Congress by a legislative Act could effectively amend the Constitution.

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[2] I share MR. JUSTICE POWELL's observation that the factual conclusions respecting the discriminatory effect of the annexations are highly questionable. *Ante*, at 195–196. I rest my dissent, however, on somewhat broader grounds.

I think it is apparent that neither of the first two theories for sustaining the exercise of congressional power supports this application of the Voting Rights Act. After our decision in *City of Mobile* there is little doubt that Rome has not engaged in *constitutionally* prohibited conduct.[3] I also do not believe that prohibition of these changes can genuinely be characterized as a remedial exercise of congressional enforcement powers. Thus, the result of the Court's holding is that Congress effectively has the power to determine for itself that this conduct violates the Constitution. This result violates previously well-established distinctions between the Judicial Branch and the Legislative or Executive Branches of the Federal Government. See *United States* v. *Nixon,* 418 U. S. 683 (1974); *Marbury* v. *Madison,* 1 Cranch 137 (1803).

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[3] At least four Members of the Court in *Mobile* held that purposeful discrimination would be prerequisite to establishing a constitutional violation in a case alleging vote dilution under the Fourteenth and Fifteenth Amendments. *Ante,* at 66–68 (opinion of Stewart, J.). While a majority of the Court might adopt this view, see *ante,* at 94 (opinion of White, J.), the voting procedures adopted by Rome would appear to readily meet the standards of constitutionality established by Mr. Justice Stevens. See *ante,* at 90.

A

If the enforcement power is construed as a "remedial" grant of authority, it is this Court's duty to ensure that a challenged congressional Act does no more than "enforce" the limitations on state power established in the Fourteenth and Fifteenth Amendments. *Marbury* v. *Madison.* The Court has not resolved the question of whether it is an appropriate exercise of remedial power for Congress to prohibit local governments from instituting structural changes in their government, which although not racially motivated, will have the effect of decreasing the ability of a black voting bloc to elect a black candidate.

This Court has found, as a matter of statutory interpretation, that Congress intended to prohibit governmental changes on the basis of no more than disparate impact under the Voting Rights Act. These cases, however, have never directly presented the constitutional questions implicated by the lower court finding in this case that the city has engaged in no purposeful discrimination in enacting these changes, or otherwise, for almost two decades. See *Beer* v. *United States,* 425 U. S. 130 (1976); *City of Richmond* v. *United States,* 422 U. S. 358 (1975); *Perkins* v. *Matthews,* 400 U. S. 379 (1971); *Fairley* v. *Patterson,* decided together with *Allen* v. *State Board of Elections,* 393 U. S. 544 (1969). In none of these cases was the Court squarely presented with a constitutional challenge to congressional power to prohibit state electoral practices after the locality has *disproved* the existence of any purposeful discrimination.[4]

The cases in which this Court has actually examined the constitutional questions relating to Congress' exercise of its powers to enforce the Fourteenth and Fifteenth Amendments also did not purport to resolve this issue.[5] But the principles which can be distilled from those precedents require the conclusion that the limitations on state power at issue cannot be sustained as a remedial exercise of power.

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[4] In *City of Petersburg* v. *United States*, 354 F. Supp. 1021 (DC 1972), summarily aff'd, 410 U. S. 962 (1973), the District Court did find that an annexation scheme could be prohibited solely on the basis of its disparate impact, without a finding of purposeful discrimination on the part of the local government. *Petersburg* cannot be considered dispositive of the question presented in this case, however. The court did not address any possible constitutional difficulties with its conclusion, and thus it is not clear that these arguments were raised by the parties. An unexplicated summary affirmance by this Court affirms only the judgment, not the reasoning, of the District Court. See *Hicks* v. *Miranda*, 422 U. S. 332 (1975).

[5] This issue was also not squarely presented or resolved in *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977). In *UJO*, the issue was whether the State could constitutionally take racial criteria into account in drawing its district lines where such redistricting was not strictly necessary to eliminate the effects of past discriminatory districting or apportionment. The Court found that use of these criteria was proper, for differing reasons. In an opinion by MR. JUSTICE WHITE, joined by three other Members of the Court, it was suggested in part that the Voting Rights Act could constitutionally require this. The only question, however, was the constitutionality of state use of racial criteria, vis-à-vis other citizens, and not the constitutionality of congressional Acts which required state governments to use racial criteria against their will. In another part of the opinion, MR. JUSTICE WHITE reasoned that "the State is [not] powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls." *Id.*, at 167. While States may be empowered to voluntarily use racial criteria in order to minimize the effects of racial-bloc voting, that conclusion does not determine the constitutional authority of Congress to require States to use racial criteria in structuring their governments.

While the Fourteenth and Fifteenth Amendments prohibit only purposeful discrimination, the decisions of this Court have recognized that in some circumstances, congressional prohibition of state or local action which is not purposefully discriminatory may nevertheless be appropriate remedial legislation under the Civil War Amendments. See *Oregon* v. *Mitchell,* 400 U. S. 112 (1970); *Gaston County* v. *United States,* 395 U. S. 285 (1969).

Those circumstances, however, are not without judicial limits. These decisions indicate that congressional prohibition of some conduct which may not itself violate the Constitution is "appropriate" legislation "to enforce" the Civil War Amendments if that prohibition is necessary to remedy prior constitutional violations by the governmental unit, or if necessary to effectively prevent purposeful discrimination by a governmental unit. In both circumstances, Congress would still be legislating in response to the incidence of state action violative of the Civil War Amendments. These precedents are carefully formulated around a historic tenet of the law that in order to invoke a remedy, there must be a wrong—and under a remedial construction of congressional power to enforce the Fourteenth and Fifteenth Amendments, that wrong must amount to a constitutional violation. Only when the wrong is identified can the appropriateness of the remedy be measured.

The Court today identifies the constitutional wrong which was the object of this congressional exercise of power as purposeful discrimination by local governments in structuring their political processes in an effort to reduce black voting strength. The Court goes on to hold that the prohibitions imposed in this case represent an "appropriate" means of preventing such constitutional violations. The Court does not rest this conclusion on any finding that this prohibition is necessary to remedy any prior discrimination by the locality. Rather, the Court reasons that prohibition of changes discriminatory in effect prevent the incidence of changes which are discriminatory in purpose:

> "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." *Ante*, at 177.

What the Court explicitly ignores is that in this case the city has proved that these changes are not discriminatory in purpose. Neither reason nor precedent supports the conclusion that here it is "appropriate" for Congress to attempt to prevent purposeful discrimination by prohibiting conduct which a locality proves is *not* purposeful discrimination.

Congress had before it evidence that various governments were enacting electoral changes and annexing territory to prevent the participation of blacks in local government by measures other than outright denial of the franchise.[6] Congress could of course remedy and prevent such purposeful discrimination on the part of local governments. See *Gomillion* v. *Lightfoot*, 364 U. S. 339, 347 (1960). And given the difficulties of proving that an electoral change or annexation has been undertaken for the purpose of discriminating against blacks, Congress could properly conclude that as a remedial matter it was necessary to place the burden of proving lack of discriminatory purpose on the localities. See *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966). But all of this does not support the conclusion that Congress is acting remedially when it continues the presumption of purposeful discrimination even after the locality has disproved that presumption. Absent other circumstances, it would be a topsy-turvy judicial system which held that electoral changes which have been affirmatively proved to be permissible under the Constitution nonetheless violate the Constitution.

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[6] See the reference to the legislative history in *United Jewish Organizations* v. *Carey*, *supra*, at 158.

The precedent on which the Court relies simply does not support its remedial characterization. Neither *Oregon* v. *Mitchell,* 400 U. S. 112 (1970), nor *South Carolina* v. *Katzenbach, supra,* legitimizes the use of an irrebuttable presumption that "vote-diluting" changes are motivated by a discriminatory animus. The principal electoral practice in issue in those cases was the use of literacy tests. Yet, the Court simply fails to make any inquiry as to whether the particular electoral practices in issue here are encompassed by the "preventive" remedial rationale invoked in *South Carolina* and *Oregon.* The rationale does support congressional prohibition of some electoral practices, but simply has no logical application to the "vote-dilution" devices in issue.

In *Oregon,* the Court sustained a nationwide prohibition of literacy tests, thereby extending the more limited suspension approved in *South Carolina.* By upholding this congressional measure, the Court established that under some circumstances, a congressional remedy may be constitutionally overinclusive by prohibiting some state action which might not be purposefully discriminatory. That possibility does not justify the overinclusiveness countenanced by the Court in this case, however. *Oregon* by no means held that Congress could simply use discriminatory effect as a proxy for discriminatory purpose, as the Court seems to imply. Instead, the Court opinions identified the factors which rendered this prohibition properly remedial. The Court found the nationwide ban to be an appropriate means of effectively preventing purposeful discrimination in the application of the literacy tests as well as an appropriate means of remedying prior constitutional violations by state and local governments in the administration of education to minorities.

The presumption that the literacy tests were either being used to purposefully discriminate, or that the disparate effects of those tests were attributable to discrimination in state-administered education was not very wide of the mark. Various opinions of the Court noted that at the time that Congress enacted the ban, few States were utilizing literacy tests, 400 U. S., at 147 (opinion of Douglas, J.), and the voter registration statistics available within those States suggested that a disparate effect was prevalent. *Id.*, at 132–133 (opinion of Black, J.). Even if not adopted with a discriminatory purpose, the tests could readily be applied in a discriminatory fashion. Thus a demonstration by the State that it sought to reinstate the tests for legitimate purposes did not eliminate the substantial risk of discrimination in application. Only a ban could effectively prevent the occurrence of purposeful discrimination.

The nationwide ban was also found necessary to effectively remedy past constitutional violations. Without the nationwide ban, a voter who was illiterate due to state discrimination in education could be denied the right to vote on the basis of his illiteracy when he moved into a jurisdiction retaining a literacy test for nondiscriminatory purposes. *Id.*, at 283–284. Finally, MR. JUSTICE STEWART found that a uniform prohibition had definite advantages for enforcement and federal relations: it reduced tensions with particular regions, and it relieved the Federal Government from the administrative burden implicated by selective state enforcement.

Presumptive prohibition of vote-diluting procedures is not similarly an "appropriate" means of exacting state compliance with the Civil War Amendments. First, these prohibitions are quite unlike the literacy ban, where the disparate effects were traceable to the discrimination of governmental bodies in education even if their present desire to use the tests was legitimate. See *Gaston County* v. *United States*, 395 U. S. 285 (1969). Any disparate impact associated with the nondiscriminatory electoral changes in issue here results from bloc voting—private rather than governmental discrimination. It is clear therefore that these prohibitions do not implicate congressional power to devise an effective remedy for prior constitutional violations by local governments. Nor does the Court invoke this aspect of congressional remedial powers.

It is also clear that while most States still utilizing literacy tests may have been doing so to discriminate, a similar generalization could not be made about all government structures which have some disparate impact on black voting strength. At the time Congress passed the Act, one study demonstrated that 60% of all cities nationwide had at-large elections for city officials, for example. This form of government was adopted by many cities throughout this century as a reform measure designed to overcome wide-scale corruption in the ward system of government. See Jewell, Local Systems of Representation: Political Consequences and Judicial Choices, 36 Geo. Wash. L. Rev. 790, 799 (1967). Obviously, annexations similarly cannot be presumed to be devoid of legitimate uses. Yet both of these practices are regularly prohibited by the Act in most covered cities.

Nor does the prohibition of all practices with a disparate impact enhance congressional prevention of purposeful discrimination. The changes in issue are not, like literacy tests, though fair on their face, subject to discriminatory application by local authorities. See *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886). They are either discriminatory from the outset or not.

Finally, the advantages supporting the imposition of a nationwide ban are simply not implicated in this case. No added administrative burdens are in issue since Congress has provided the mechanism for preclearance suits in any event, and the burden of proof for this issue is on the locality. And it is certain that the only constitutional wrong implicated—purposeful dilution—can be effectively remedied by prohibiting it where it occurs. For all these reasons, I do not think that the present case is controlled by the result in *Oregon*. By prohibiting all electoral changes with a disparate impact, Congress has attempted to prevent disparate impacts—not purposeful discrimination.

Congress unquestionably has the power to prohibit and remedy state action which intentionally deprives citizens of Fourteenth and Fifteenth Amendment rights. But unless these powers are to be wholly uncanalized, it cannot be appropriate remedial legislation for Congress to prohibit Rome from structuring its government in the manner as its population sees fit absent a finding or unrebutted presumption that Rome has been, or is, intentionally discriminating against its black citizens. Rome has simply committed no constitutional violations, as this Court has defined them.

More is at stake than sophistry at its worst in the Court's conclusion that requiring the local government to structure its political system in a manner that most effectively enhances black political strength serves to remedy or prevent constitutional wrongs on the part of the local government. The need to prevent this disparate impact is premised on the assumption that white candidates will not represent black interests, and that States should devise a system encouraging blacks to vote in a bloc for black candidates. The findings in this case alone demonstrate the tenuous nature of these assumptions. The court below expressly found that white officials have ably represented the interests of the black community. Even blacks who testified admitted no dissatisfaction, but expressed only a preference to be represented by officials of their own race. The enforcement provisions of the Civil War Amendments were not premised on the notion that Congress could empower a later generation of blacks to "get even" for wrongs inflicted on their forebears. What is now at stake in the city of Rome is the preference of the black community to be represented by a black. This Court has never elevated such a notion, by no means confined to blacks, to the status of a constitutional right. See *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971). This Court concluded in *Whitcomb* that

> "[t]he mere fact that one interest group or another concerned with the outcome of . . . elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system." *Id.*, at 154–155.

The Constitution imposes no obligation on local governments to erect institutional safeguards to ensure the election of a black candidate. Nor do I believe that Congress can do so, absent a finding that this obligation would be necessary to remedy constitutional violations on the part of the local government.

It is appropriate to add that even if this Court could find a remedial relationship between the prohibition of all state action with a disparate impact on black voting strength and the incidence of purposeful discrimination, this Court should exercise caution in approving the remedy in issue here absent purposeful dilution. Political theorists can readily differ on the advantages inherent in different governmental structures. As Mr. Justice Harlan noted in his dissent in *Fairley* v. *Patterson*, decided together with *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969): "[I]t is not clear to me how a court would go about deciding whether an at-large system is to be preferred over a district system. Under one system, Negroes have some influence in the election of all officers; under the other, minority groups have more influence in the selection of fewer officers." *Id.*, at 586 (emphasis deleted).

B

The result reached by the Court today can be sustained only upon the theory that Congress was empowered to determine that structural changes with a disparate impact on a minority group's ability to elect a candidate of their race violates the Fourteenth or Fifteenth Amendment. This construction of the Fourteenth Amendment was rejected in the *Civil Rights Cases,* 109 U. S. 3 (1883). The Court emphasized that the power conferred was "remedial" only. The Court reasoned that the structure of the Amendment made it clear that it did not "authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers . . . , when these are subversive of the fundamental rights specified in the [A]mendment." *Id.,* at 11. This interpretation is consonant with the legislative history surrounding the enactment of the Amendment.[7]

This construction has never been refuted by a majority of the Members of this Court. Support for this construction in current years has emerged in *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966), and *Oregon* v. *Mitchell,* 400 U. S. 112 (1970).[8] See also opinion of POWELL, J., *ante,* at 200–201. In *South Carolina* v. *Katzenbach,* the Court observed that Congress could not attack evils not comprehended by the Fifteenth Amendment. 383 U. S., at 326. In *Oregon* v. *Mitchell,* five Members of the Court were unwilling to conclude that Congress had the power to determine that establishing the age limitation for voting at 21 denied equal protection to those between the ages of 18 and 20.

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[7] See, *e. g.,* Burt, Miranda And Title II: A Morganatic Marriage, 1969 S. Ct. Rev. 81.

[8] Explicit support can also be derived from Mr. Justice Harlan's dissenting opinion, joined by MR. JUSTICE STEWART, in *Katzenbach* v. *Morgan,* 384 U. S. 641, 659 (1966). Mr. Justice Harlan clarified the need for the remedial construction of congressional powers. It is also unnecessary, however, to read the majority opinion as establishing the Court's rejection of the remedial construction of the *Civil Rights Cases.* While MR. JUSTICE BRENNAN's majority opinion did contain language suggesting a rejection of the "remedial" construction of the enforcement powers, the opinion also advanced a remedial rationale which supports the determination reached by the Court. Compare the rationales forwarded at 384 U. S., at 654 with the statements, *id.,* at 656. It would be particularly inappropriate to construe *Katzenbach* v. *Morgan* as a rejection of the remedial interpretation of congressional powers in view of this Court's subsequent decision in *Oregon* v. *Mitchell.*

The opinion of MR. JUSTICE STEWART in that case, joined by MR. CHIEF JUSTICE BURGER and MR. JUSTICE BLACKMUN, reaffirmed that Congress only has the power under the Fourteenth Amendment to "provide the means of eradicating situations that amount to a violation of the Equal Protection Clause" but not to "determine as a matter of substantive constitutional law what situations fall within the ambit of the clause." *Id.*, at 296. Mr. Justice Harlan, in a separate opinion, reiterated his belief that it is the duty of the Court, and not the Congress, to determine when States have exceeded constitutional limitations imposed upon their powers. *Id.*, at 204-207. Cf. *Oregon* v. *Hass*, 420 U. S. 714 (1975); *Cooper* v. *Aaron*, 358 U. S. 1, 18 (1958). Mr. Justice Black also was unwilling to accept the broad construction of enforcement powers formulated in the opinion of MR. JUSTICE BRENNAN, joined by JUSTICES WHITE and MARSHALL.[9]

The Court today fails to heed this prior precedent. To permit congressional power to prohibit the conduct challenged in this case requires state and local governments to cede far more of their powers to the Federal Government than the Civil War Amendments ever envisioned; and it requires the judiciary to cede far more of its power to interpret and enforce the Constitution than ever envisioned. The intrusion is all the more offensive to our constitutional system when it is recognized that the only values fostered are debatable assumptions about political theory which should properly be left to the local democratic process.

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[9] Since Mr. Justice Black found that congressional powers were more circumscribed when not acting to counter racial discrimination under the Fourteenth Amendment, he did not have to determine the precise nature of congressional powers when they were exercised in the field of racial relations. His analysis of the nationwide ban on literacy tests, also presented in *Oregon* v. *Mitchell*, however, is consistent with a remedial interpretation of those powers.

CITY OF MOBILE, ALABAMA, ET AL. *v.* BOLDEN ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 77-1844. Argued March 19, 1979—Reargued October 29, 1979—Decided April 22, 1980

Mobile, Ala., is governed by a Commission consisting of three members elected at large who jointly exercise all legislative, executive, and administrative power in the city. Appellees brought a class action in Federal District Court against the city and the incumbent Commissioners on behalf of all Negro citizens of the city, alleging, *inter alia,* that the practice of electing the City Commissioners at large unfairly diluted the voting strength of Negroes in violation of the Fourteenth and Fifteenth Amendments. Although finding that Negroes in Mobile "register and vote without hindrance," the District Court nevertheless held that the at-large electoral system violated the Fifteenth Amendment and invidiously discriminated against Negroes in violation of the Equal Protection Clause of the Fourteenth Amendment, and ordered that the Commission be disestablished and replaced by a Mayor and a Council elected from single-member districts. The Court of Appeals affirmed.

Held: The judgment is reversed, and the case is remanded. Pp. 61-80; 80-83; 83-94.

571 F. 2d 238, reversed and remanded.

MR. JUSTICE STEWART, joined by THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST, concluded:

1. Mobile's at-large electoral system does not violate the rights of the city's Negro voters in contravention of the Fifteenth Amendment. Racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation. The Amendment does not entail the right to have Negro candidates elected but prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote "on account of race, color, or previous condition of servitude." Here, having found that Negroes in Mobile register and vote without hindrance, the courts below erred in believing that appellants invaded the protection of the Fifteenth Amendment. Pp. 61-65.

2. Nor does Mobile's at-large electoral system violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 65-80.

(a) Only if there is purposeful discrimination can there be a violation of the Equal Protection Clause. And this principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination. Pp. 66–68.

(b) Disproportionate effects alone are insufficient to establish a claim of unconstitutional racial vote dilution. Where the character of a law is readily explainable on grounds apart from race, as would nearly always be true where, as here, an entire system of local governance is brought into question, disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose. Pp. 68–70.

(c) Even assuming that an at-large municipal electoral system such as Mobile's is constitutionally indistinguishable from the election of a few members of a state legislature in multimember districts, it is clear that the evidence in this case fell far short of showing that appellants "conceived or operated [a] purposeful devic[e] to further racial . . . discrimination," *Whitcomb* v. *Chavis,* 403 U. S. 124, 149. Pp. 70–74.

(d) The Equal Protection Clause does not require proportional representation as an imperative of political organization. While the Clause confers a substantive right to participate in elections on an equal basis with other qualified voters, this right does not protect any "political group," however defined, from electoral defeat. Since Mobile is a unitary electoral district and the Commission elections are conducted at large, there can be no claim that the "one person, one vote" principle has been violated, and therefore nobody's vote has been "diluted" in the sense in which that word was used in *Reynolds* v. *Sims,* 377 U. S. 533. Pp. 75–80.

MR. JUSTICE BLACKMUN concluded that the relief afforded appellees by the District Court was not commensurate with the sound exercise of judicial discretion. The court at least should have considered alternative remedial orders to converting Mobile's government to a mayor-council system, and in failing to do so the court appears to have been overly concerned with eliminating at-large elections *per se,* rather than with structuring an electoral system that provided an opportunity for black voters to participate in the city's government on an equal footing with whites. Pp. 80–83.

MR. JUSTICE STEVENS concluded that the proper standard for adjudging the constitutionality of a political structure, such as Mobile's, that treats all individuals as equals but adversely affects the political strength of an identifiable minority group, is the same whether the minority is identified by a racial, ethnic, religious, or economic characteristic; that *Gomillion* v. *Lightfoot,* 364 U. S. 339, suggests that the standard asks

(1) whether the political structure is manifestly not the product of a routine or traditional decision; (2) whether it has a significant adverse impact on a minority group; and (3) whether it is unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority; and that the standard focuses on the objective effects of the political decision rather than the subjective motivation of the decisionmaker. Under this standard the choice to retain Mobile's commission form of government must be accepted as constitutionally permissible even though the choice may well be the product of mixed motivation, some of which is invidious. Pp. 83–94.

STEWART, J., announced the Court's judgment and delivered an opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, *post,* p. 80. STEVENS, J., filed an opinion concurring in the judgment, *post,* p. 83. BRENNAN, J., *post,* p. 94, WHITE, J., *post,* p. 94, and MARSHALL, J., *post,* p. 103, filed dissenting opinions.

Charles S. Rhyne reargued the cause for appellants. With him on the brief on reargument were *C. B. Arendall, Jr., William C. Tidwell III, Fred G. Collins,* and *William S. Rhyne.* With him on the briefs on the original argument were Messrs. Arendall, Collins, and Rhyne, *Donald A. Carr,* and *Martin W. Matzen.*

J. U. Blacksher reargued the cause for appellees. With him on the briefs were *Larry Menefee, Jack Greenberg,* and *Eric Schnapper.*

Deputy Assistant Attorney General Turner reargued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General McCree, Assistant Attorney General Days, Deputy Solicitor General Wallace, Elinor Hadley Stillman, Brian K. Landsberg, Jessica Dunsay Silver, Dennis J. Dimsey,* and *Miriam R. Eisenstein.**

**Charles A. Bane, Thomas D. Barr, Norman Redlich, Frank R. Parker,* and *Robert A. Murphy* filed a brief for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae* urging affirmance.

MR. JUSTICE STEWART announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join.

The city of Mobile, Ala., has since 1911 been governed by a City Commission consisting of three members elected by the voters of the city at large. The question in this case is whether this at-large system of municipal elections violates the rights of Mobile's Negro voters in contravention of federal statutory or constitutional law.

The appellees brought this suit in the Federal District Court for the Southern District of Alabama as a class action on behalf of all Negro citizens of Mobile.[1] Named as defendants were the city and its three incumbent Commissioners, who are the appellants before this Court. The complaint alleged that the practice of electing the City Commissioners at large unfairly diluted the voting strength of Negroes in violation of § 2 of the Voting Rights Act of 1965,[2] of the Fourteenth Amendment, and of the Fifteenth Amendment. Following a bench trial, the District Court found that the constitutional rights of the appellees had been violated, entered a judgment in their favor, and ordered that the City Commission be disestablished and replaced by a municipal government consisting of a Mayor and a City Council with members elected from single-member districts. 423 F. Supp. 384.[3] The Court of Appeals affirmed the judgment in its entirety, 571 F. 2d 238, agreeing that Mobile's at-large elections operated to discriminate against Negroes in violation of the Fourteenth and Fifteenth Amendments, *id.*, at 245, and finding that the remedy formulated by the District Court was appropriate. An appeal was taken to this Court, and we noted probable jurisdiction, 439 U. S. 815. The case was originally argued in the 1978 Term, and was reargued in the present Term.

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[1] Approximately 35.4% of the residents of Mobile are Negro.

[2] 79 Stat. 437, as amended, 42 U. S. C. § 1973. The complaint also contained claims based on the First and Thirteenth Amendments and on 42 U. S. C. § 1983 and 42 U. S. C. § 1985 (3) (1976 ed., Supp. II). Those claims have not been pressed in this Court.

[3] The District Court has stayed its orders pending disposition of the present appeal.

I

In Alabama, the form of municipal government a city may adopt is governed by state law. Until 1911 cities not covered by specific legislation were limited to governing themselves through a mayor and city council.[4] In that year, the Alabama Legislature authorized every large municipality to adopt a commission form of government.[5] Mobile established its City Commission in the same year, and has maintained that basic system of municipal government ever since.

The three Commissioners jointly exercise all legislative, executive, and administrative power in the municipality. They are required after election to designate one of their number as Mayor, a largely ceremonial office, but no formal provision is made for allocating specific executive or administrative duties among the three.[6] As required by the state law enacted in 1911, each candidate for the Mobile City Commission runs for election in the city at large for a term of four years in one of three numbered posts, and may be elected only by a majority of the total vote. This is the same basic electoral system that is followed by literally thousands of municipalities and other local governmental units throughout the Nation.[7]

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[4] Ala. Code § 11-43 (1975).

[5] Act No. 281, 1911 Ala. Acts, p. 330.

[6] In 1965 the Alabama Legislature enacted Act No. 823, 1965 Ala. Acts, p. 1539, § 2 of which designated specific administrative tasks to be performed by each Commissioner and provided that the title of Mayor be rotated among the three. After the present lawsuit was commenced, the city of Mobile belatedly submitted Act No. 823 to the Attorney General of the United States under § 5 of the Voting Rights Act of 1965. 42 U. S. C. § 1973c. The Attorney General objected to the legislation on the ground that the city had not shown that § 2 of the Act would not have the effect of abridging the right of Negroes to vote. No suit has been brought in the District Court for the District of Columbia to seek clearance under § 5 of the Voting Rights Act and, accordingly, § 2 of Act No. 823 is in abeyance.

II

Although required by general principles of judicial administration to do so, *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U. S. 101, 105; *Ashwander* v. *TVA,* 297 U. S. 288, 347 (Brandeis, J., concurring), neither the District Court nor the Court of Appeals addressed the complaint's statutory claim—that the Mobile electoral system violates § 2 of the Voting Rights Act of 1965. Even a cursory examination of that claim, however, clearly discloses that it adds nothing to the appellees' complaint.

Section 2 of the Voting Rights Act provides:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437, as amended, 42 U. S. C. § 1973.

Assuming, for present purposes, that there exists a private right of action to enforce this statutory provision,[8] it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment,[9] and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself.

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[7] According to the 1979 Municipal Year Book, most municipalities of over 25,000 people conducted at-large elections of their city commissioners or council members as of 1977. *Id.,* at 98–99. It is reasonable to suppose that an even larger majority of other municipalities did so.

[8] Cf. *Allen* v. *State Board of Elections,* 393 U. S. 544. But see *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S. 11; *Touche Ross & Co.* v. *Redington,* 442 U. S. 560.

[9] Section 1 of the Fifteenth Amendment provides:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Section 2 was an uncontroversial provision in proposed legislation whose other provisions engendered protracted dispute. The House Report on the bill simply recited that § 2 "grants . . . a right to be free from enactment or enforcement of voting qualifications . . . or practices which deny or abridge the right to vote on account of race or color." H. R. Rep. No. 439, 89th Cong., 1st Sess., 23 (1965). See also S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, pp. 19–20 (1965). The view that this section simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings. Senator Dirksen indicated at one point that all States, whether or not covered by the preclearance provisions of § 5 of the proposed legislation, were prohibited from discriminating against Negro voters by § 2, which he termed "almost a rephrasing of the 15th [A]mendment." Attorney General Katzenbach agreed. See Voting Rights: Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 1, p. 208 (1965).

In view of the section's language and its sparse but clear legislative history, it is evident that this statutory provision adds nothing to the appellees' Fifteenth Amendment claim. We turn, therefore, to a consideration of the validity of the judgment of the Court of Appeals with respect to the Fifteenth Amendment.

III

The Court's early decisions under the Fifteenth Amendment established that it imposes but one limitation on the powers of the States. It forbids them to discriminate against Negroes in matters having to do with voting. See *Ex parte Yarbrough,* 110 U. S. 651, 665; *Neal* v. *Delaware,* 103 U. S. 370, 389–390; *United States* v. *Cruikshank,* 92 U. S. 542, 555–556; *United States* v. *Reese,* 92 U. S. 214. The Amendment's command and effect are wholly negative. "The Fifteenth Amendment does not confer the right of suffrage upon any one," but has "invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." *Id.*, at 217–218.

Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose. In *Guinn* v. *United States*, 238 U. S. 347, this Court struck down a "grandfather" clause in a state constitution exempting from the requirement that voters be literate any person or the descendants of any person who had been entitled to vote before January 1, 1866. It was asserted by way of defense that the provision was immune from successful challenge, since a law could not be found unconstitutional either "by attributing to the legislative authority an occult motive," or "because of conclusions concerning its operation in practical execution and resulting discrimination arising . . . from inequalities naturally inhering in those who must come within the standard in order to enjoy the right to vote." *Id.*, at 359. Despite this argument, the Court did not hesitate to hold the grandfather clause unconstitutional, because it was not "possible to discover any basis in reason for the standard thus fixed other than the purpose" to circumvent the Fifteenth Amendment. *Id.*, at 365.

The Court's more recent decisions confirm the principle that racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation. In *Gomillion* v. *Lightfoot*, 364 U. S. 339, the Court held that allegations of a racially motivated gerrymander of municipal boundaries stated a claim under the Fifteenth Amendment. The constitutional infirmity of the state law in that case, according to the allegations of the complaint, was that in drawing the municipal boundaries the legislature was "solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." *Id.*, at 341. The Court made clear that in the absence of such an invidious purpose, a State is constitutionally free to redraw political boundaries in any manner it chooses. *Id.*, at 347.[10]

In *Wright* v. *Rockefeller*, 376 U. S. 52, the Court upheld by like reasoning a state congressional reapportionment statute against claims that district lines had been racially gerrymandered, because the plaintiffs failed to prove that the legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; or that the statute "was the product of a state contrivance to segregate on the basis of race or place of origin." *Id.*, at 56, 58.[11] See also *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45; *Lane* v. *Wilson*, 307 U. S. 268, 275–277.

While other of the Court's Fifteenth Amendment decisions have dealt with different issues, none has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation. The cases of *Smith* v. *Allwright*, 321 U. S. 649, and *Terry* v. *Adams*, 345 U. S. 461, for example, dealt with the question whether a State was so involved with racially discriminatory voting practices as to invoke the Amendment's protection. Although their facts differed somewhat, the question in both cases was whether the State was sufficiently implicated in the conduct of racially exclusionary primary elections to make that discrimination an abridgment of the right to vote *by a State*. Since the Texas Democratic Party primary in *Smith* v. *Allwright* was regulated by statute, and only party nominees chosen in a primary were placed on the ballot for the general election, the Court concluded that the state Democratic Party had become the agency of the State, and that the State thereby had "endorse[d], adopt[ed] and enforce[d] the discrimination against Negroes, practiced by a party." 321 U. S., at 664.

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[10] The Court has repeatedly cited *Gomillion* v. *Lightfoot* for the principle that an invidious *purpose* must be adduced to support a claim of unconstitutionality. See *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 272; *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 265, 266; *Washington* v. *Davis*, 426 U. S. 229, 240.

[11] MR. JUSTICE MARSHALL has elsewhere described the fair import of the *Gomillion* and *Wright* cases: "In the two Fifteenth Amendment redistricting cases, *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), and *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), the Court suggested that legislative purpose alone is determinative, although language in both cases may be isolated that seems to approve some inquiry into effect insofar as it elucidates purpose." *Beer* v. *United States*, 425 U. S. 130, 148, n. 4 (dissenting opinion).

The Court in the *Wright* case also rejected claims made under the Equal Protection Clause of the Fourteenth Amendment. See *infra*, at 67.

Terry v. *Adams, supra,* posed a more difficult question of state involvement. The primary election challenged in that case was conducted by a county political organization, the Jaybird Association, that was neither authorized nor regulated under state law. The candidates chosen in the Jaybird primary, however, invariably won in the subsequent Democratic primary and in the general election, and the Court found that the Fifteenth Amendment had been violated. Although the several supporting opinions differed in their formulation of this conclusion, there was agreement that the State was involved in the purposeful exclusion of Negroes from participation in the election process.

The appellees have argued in this Court that *Smith* v. *Allwright* and *Terry* v. *Adams* support the conclusion that the at-large system of elections in Mobile is unconstitutional, reasoning that the effect of racially polarized voting in Mobile is the same as that of a racially exclusionary primary. The only characteristic, however, of the exclusionary primaries that offended the Fifteenth Amendment was that Negroes were not permitted to vote in them. The difficult question was whether the "State ha[d] had a hand in" the patent discrimination practiced by a nominally private organization. *Terry* v. *Adams, supra,* at 473 (opinion of Frankfurter, J.).

The answer to the appellees' argument is that, as the District Court expressly found, their freedom to vote has not been denied or abridged by anyone. The Fifteenth Amendment does not entail the right to have Negro candidates elected, and neither *Smith* v. *Allwright* nor *Terry* v. *Adams* contains any implication to the contrary. That Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote "on account of race, color, or previous condition of servitude." Having found that Negroes in Mobile "register and vote without hindrance," the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case.

IV

The Court of Appeals also agreed with the District Court that Mobile's at-large electoral system violates the Equal Protection Clause of the Fourteenth Amendment. There remains for consideration, therefore, the validity of its judgment on that score.

A

The claim that at-large electoral schemes unconstitutionally deny to some persons the equal protection of the laws has been advanced in numerous cases before this Court. That contention has been raised most often with regard to multimember constituencies within a state legislative apportionment system. The constitutional objection to multimember districts is not and cannot be that, as such, they depart from apportionment on a population basis in violation of *Reynolds* v. *Sims,* 377 U. S. 533, and its progeny. Rather the focus in such cases has been on the lack of representation multimember districts afford various elements of the voting population in a system of representative legislative democracy. "Criticism [of multimember districts] is rooted in their winner-take-all aspects, their tendency to submerge minorities . . . , a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests." *Whitcomb* v. *Chavis,* 403 U. S. 124, 158–159.

Despite repeated constitutional attacks upon multimember legislative districts, the Court has consistently held that they are not unconstitutional *per se, e. g., White* v. *Regester,* 412 U. S. 755; *Whitcomb* v. *Chavis, supra; Kilgarlin* v. *Hill,* 386 U. S. 120; *Burns* v. *Richardson,* 384 U. S. 73; *Fortson* v. *Dorsey,* 379 U. S. 433.[12] We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. See *White* v. *Regester, supra; Whitcomb* v. *Chavis, supra; Burns* v. *Richardson, supra; Fortson* v. *Dorsey, supra.* To prove such a purpose it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. *White* v. *Regester, supra,* at 765–766; *Whitcomb* v. *Chavis,* 403 U. S., at 149–150. A plaintiff must prove that the disputed plan was "conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination," *id.,* at 149.

This burden of proof is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment. See *Washington* v. *Davis,* 426 U. S. 229;

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[12] We have made clear, however, that a court in formulating an apportionment plan as an exercise of its equity powers should, as a general rule, not permit multimember legislative districts. "[S]ingle-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result. *Mahan* v. *Howell,* 410 U. S. 315, 333." *Connor* v. *Finch,* 431 U. S. 407, 415.

Arlington Heights v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252; *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256. The Court explicitly indicated in *Washington* v. *Davis* that this principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination. Indeed, the Court's opinion in that case viewed *Wright* v. *Rockefeller*, 376 U. S. 52, as an apt illustration of the principle that an illicit purpose must be proved before a constitutional violation can be found. The Court said:

> "The rule is the same in other contexts. *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), upheld a New York congressional apportionment statute against claims that district lines had been racially gerrymandered. The challenged districts were made up predominantly of whites or of minority races, and their boundaries were irregularly drawn. The challengers did not prevail because they failed to prove that the New York Legislature 'was either motivated by racial considerations or in fact drew the districts on racial lines'; the plaintiffs had not shown that the statute 'was the product of a state contrivance to segregate on the basis of race or place of origin.' *Id.*, at 56, 58. The dissenters were in agreement that the issue was whether the 'boundaries . . . were purposefully drawn on racial lines.' *Id.*, at 67." *Washington* v. *Davis, supra,* at 240.

More recently, in *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra,* the Court again relied on *Wright* v. *Rockefeller* to illustrate the principle that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U. S., at 265. Although dicta may be drawn from a few of the Court's earlier opinions suggesting that disproportionate effects alone may establish a claim of unconstitutional racial vote dilution, the fact is that such a view is not supported by any decision of this Court.[13] More importantly, such a view is not consistent with the meaning of the Equal Protection Clause as it has been understood in a variety of other contexts involving alleged racial discrimination. *Washington* v. *Davis, supra* (employment); *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra* (zoning); *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U. S. 189, 208 (public schools); *Akins* v. *Texas,* 325 U. S. 398, 403–404 (jury selection).

In only one case has the Court sustained a claim that multimember legislative districts unconstitutionally diluted the voting strength of a discrete group. That case was *White* v. *Regester*. There the Court upheld a constitutional challenge by Negroes and Mexican-Americans to parts of a legislative reapportionment plan adopted by the State of Texas. The plaintiffs alleged that the multimember districts for the two counties in which they resided minimized the effect of their votes in violation of the Fourteenth Amendment, and the Court held that the plaintiffs had been able to "produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group[s] in question." 412 U. S., at 766, 767. In so holding, the Court relied upon evidence in the record that included a long history of official discrimination against minorities as well as indifference to their needs and interests on the part of white elected officials. The Court also found in each county additional factors that restricted the access of minority groups to the political process. In one county, Negroes effectively were excluded from the process of slating candidates for the Democratic Party, while the plaintiffs in the other county were Mexican-Americans who "suffer[ed] a cultural and language barrier" that made "participation in community processes extremely difficult, particularly . . . with respect to the political life" of the county. *Id.*, at 768 (footnote omitted).

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[13] The dissenting opinion of MR. JUSTICE MARSHALL reads the Court's opinion in *Fortson* v. *Dorsey,* 379 U. S. 433, to say that a claim of vote dilution under the Equal Protection Clause could rest on either discriminatory purpose or effect. *Post*, at 108. In fact, the Court explicitly reserved this question and expressed no view concerning it. That case involved solely a claim, which the Court rejected, that a state legislative apportionment statute creating some multimember districts was constitutionally infirm on its face. Although the Court recognized that "designedly or otherwise," multimember districting schemes might, under the circumstances of a particular case, minimize the voting strength of a racial group, an issue as to the constitutionality of such an arrangement "[was] not presented by the record," and "'our holding ha[d] no bearing on that wholly separate question.'" 379 U. S., at 439.

The phrase "designedly or otherwise" in which this dissenting opinion places so much stock, was repeated, also in dictum, in *Burns* v. *Richardson,* 384 U. S. 73, 88. But the constitutional challenge to the multimember constituencies failed in that case because the plaintiffs demonstrated neither discriminatory purpose nor effect. *Id.*, at 88–90, and nn. 15 and 16.

White v. *Regester* is thus consistent with "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose," *Washington* v. *Davis*, *supra*, at 240. The Court stated the constitutional question in *White* to be whether the "multimember districts [were] *being used invidiously* to cancel out or minimize the voting strength of racial groups," 412 U. S., at 765 (emphasis added), strongly indicating that only a purposeful dilution of the plaintiffs' vote would offend the Equal Protection Clause.[14]

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[14] In *Gaffney* v. *Cummings*, 412 U. S. 735, a case decided the same day as *White* v. *Regester*, the Court interpreted both *White* and the earlier vote dilution cases as turning on the existence of discriminatory purpose:

"State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment. A districting statute otherwise acceptable, may be invalid because it fences out a racial group so as to deprive them of their pre-existing municipal vote. *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are *employed* 'to minimize or cancel out the voting strength of racial or political elements of

Moreover, much of the evidence on which the Court relied in that case was relevant only for the reason that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S., at 264–265. Of course, "[t]he impact of the official action—whether it 'bears more heavily on one race than another,' *Washington* v. *Davis, supra,* at 242—may provide an important starting point." *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra,* at 266. But where the character of a law is readily explainable on grounds apart from race, as would nearly always be true where, as here, an entire system of local governance is brought into question, disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose. See *ibid.; Washington* v. *Davis,* 426 U. S., at 242.

We may assume, for present purposes, that an at-large election of city officials with all the legislative, executive, and administrative power of the municipal government is constitutionally indistinguishable from the election of a few members of a state legislative body in multimember districts—although this may be a rash assumption.[15] But even making this assumption, it is clear that the evidence in the present case fell far short of showing that the appellants "conceived or operated [a] purposeful devic[e] to further racial . . . discrimination." *Whitcomb* v. *Chavis,* 403 U. S., at 149.

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the voting population.' *Fortson* v. *Dorsey,* 379 U. S. 433, 439 (1965). See *White* v. *Regester, post,* p. 755; *Whitcomb* v. *Chavis,* 403 U. S. 124 (1971); *Abate* v. *Mundt,* 403 U. S., at 184, n. 2; *Burns* v. *Richardson,* 384 U. S., at 88–89." 412 U. S., at 751 (emphasis added).

[15] See *Wise* v. *Lipscomb,* 437 U. S. 535, 550 (opinion of REHNQUIST, J.). It is noteworthy that a system of at-large city elections in place of elections of city officials by the voters of small geographic wards was universally heralded not many years ago as a praiseworthy and progressive reform of corrupt municipal government. See, *e. g.,* E. Banfield & J. Wilson, City Politics 151 (1963). Cf. M. Seasongood, Local Government in the United States (1933); L. Steffens, The Shame of the Cities (1904).

The District Court assessed the appellees' claims in light of the standard that had been articulated by the Court of Appeals for the Fifth Circuit in *Zimmer* v. *McKeithen*, 485 F. 2d 1297. That case, coming before *Washington* v. *Davis*, 426 U. S. 229, was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause—that proof of a discriminatory effect is sufficient. See 485 F. 2d, at 1304–1305, and n. 16.[16]

In light of the criteria identified in *Zimmer*, the District Court based its conclusion of unconstitutionality primarily on the fact that no Negro had ever been elected to the City Commission, apparently because of the pervasiveness of racially polarized voting in Mobile. The trial court also found that city officials had not been as responsive to the interests of Negroes as to those of white persons. On the basis of these findings, the court concluded that the political processes in Mobile were not equally open to Negroes, despite its seemingly inconsistent findings that there were no inhibitions against Negroes becoming candidates, and that in fact Negroes had registered and voted without hindrance. 423 F. Supp., at 387. Finally, with little additional discussion, the District Court held that Mobile's at-large electoral system was invidiously discriminating against Negroes in violation of the Equal Protection Clause.[17]

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[16] This Court affirmed the judgment of the Court of Appeals in *Zimmer* v. *McKeithen* on grounds other than those relied on by that court and explicitly "without approval of the constitutional views expressed by the Court of Appeals." *East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636, 638 (*per curiam*).

[17] The only indication given by the District Court of an inference that there existed an invidious purpose was the following statement: "It is not a long step from the *systematic exclusion of blacks* from juries which is itself such an 'unequal application of the law . . . as to show intentional discrimination,' *Akins* v. *Texas*, 325 U. S. 398, 404, . . . to [the] present purpose to dilute the black vote as evidenced in this case. There

In affirming the District Court, the Court of Appeals acknowledged that the Equal Protection Clause of the Fourteenth Amendment reaches only purposeful discrimination,[18] but held that one way a plaintiff may establish this illicit purpose is by adducing evidence that satisfies the criteria of its decision in *Zimmer* v. *McKeithen, supra.* Thus, because the appellees had proved an "aggregate" of the *Zimmer* factors, the Court of Appeals concluded that a discriminatory purpose

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is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as the intentional state action referred to in *Keyes* [v. *School District No. 1, Denver Colo.,* 413 U. S. 189]." 423 F. Supp., at 398.

What the District Court may have meant by this statement is uncertain. In any event the analogy to the racially exclusionary jury cases appears mistaken. Those cases typically have involved a consistent pattern of discrete official actions that demonstrated almost to a mathematical certainty that Negroes were being excluded from juries because of their race. See *Castaneda* v. *Partida,* 430 U. S. 482, 495–497, and n. 17; *Patton* v. *Mississippi,* 332 U. S. 463, 466–467; *Pierre* v. *Louisiana,* 306 U. S. 354, 359; *Norris* v. *Alabama,* 294 U. S. 587, 591.

If the District Court meant by its statement that the existence of the at-large electoral system was, like the systematic exclusion of Negroes from juries, unexplainable on grounds other than race, its inference is contradicted by the history of the adoption of that system in Mobile. Alternatively, if the District Court meant that the state legislature may be presumed to have "intended" that there would be no Negro Commissioners, simply because that was a foreseeable consequence of at-large voting, it applied an incorrect legal standard. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass.* v. *Feeney,* 442 U. S., at 279 (footnotes omitted).

[18] The Court of Appeals expressed the view that the District Court's finding of discrimination in light of the *Zimmer* criteria was "buttressed" by the fact that the Attorney General had interposed an objection under § 5 of the Voting Rights Act of 1965 to the state statute designating the functions of each Commissioner. 571 F. 2d 238, 246 (CA5). See n. 6, *supra.*

had been proved. That approach, however, is inconsistent with our decisions in *Washington* v. *Davis, supra,* and *Arlington Heights, supra.* Although the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose. The so-called *Zimmer* criteria upon which the District Court and the Court of Appeals relied were most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case.

First, the two courts found it highly significant that no Negro had been elected to the Mobile City Commission. From this fact they concluded that the processes leading to nomination and election were not open equally to Negroes. But the District Court's findings of fact, unquestioned on appeal, make clear that Negroes register and vote in Mobile "without hindrance," and that there are no official obstacles in the way of Negroes who wish to become candidates for election to the Commission. Indeed, it was undisputed that the only active "slating" organization in the city is comprised of Negroes. It may be that Negro candidates have been defeated, but that fact alone does not work a constitutional deprivation. *Whitcomb* v. *Chavis,* 403 U. S., at 160; see *Arlington Heights,* 429 U. S., at 266, and n. 15.[19]

Second, the District Court relied in part on its finding that the persons who were elected to the Commission discriminated against Negroes in municipal employment and in dispensing public services. If that is the case, those discriminated against may be entitled to relief under the Constitution, albeit of a sort quite different from that sought in the present case. The Equal Protection Clause proscribes purposeful discrimination because of race by any unit of state government, whatever the method of its election. But evidence of discrimination by white officials in Mobile is relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices.[20]

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[19] There have been only three Negro candidates for the City Commission, all in 1973. According to the District Court, the Negro candidates "were young, inexperienced, and mounted extremely limited campaigns" and received only "modest support from the black community. . . ." 423 F. Supp., at 388.

Third, the District Court and the Court of Appeals supported their conclusion by drawing upon the substantial history of official racial discrimination in Alabama. But past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question.

Finally, the District Court and the Court of Appeals pointed to the mechanics of the at-large electoral system itself as proof that the votes of Negroes were being invidiously canceled out. But those features of that electoral system, such as the majority vote requirement, tend naturally to disadvantage any voting minority, as we noted in *White* v. *Regester*, 412 U. S. 755. They are far from proof that the at-large electoral scheme represents purposeful discrimination against Negro voters.[21]

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[20] Among the difficulties with the District Court's view of the evidence was its failure to identify the state officials whose intent it considered relevant in assessing the invidiousness of Mobile's system of government. To the extent that the inquiry should properly focus on the state legislature, see n. 21, *infra*, the actions of unrelated governmental officials would be, of course, of questionable relevance.

[21] According to the District Court, voters in the city of Mobile are represented in the state legislature by three state senators, any one of whom can veto proposed local legislation under the existing courtesy rule. Likewise, a majority of Mobile's 11-member House delegation can prevent a local bill from reaching the floor for debate. Unanimous approval of a local measure by the city delegation, on the other hand, virtually assures passage. 423 F. Supp., at 397.

There was evidence in this case that several proposals that would have

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We turn finally to the arguments advanced in Part I of MR. JUSTICE MARSHALL's dissenting opinion. The theory of this dissenting opinion—a theory much more extreme than that espoused by the District Court or the Court of Appeals—appears to be that every "political group," or at least every such group that is in the minority, has a federal constitutional right to elect candidates in proportion to its numbers.[22] Moreover, a political group's "right" to have its candidates elected is said to be a "fundamental interest," the infringement of which may be established without proof that a State has acted with the purpose of impairing anybody's access to the political process. This dissenting opinion finds the "right" infringed in the present case because no Negro has been elected to the Mobile City Commission.

Whatever appeal the dissenting opinion's view may have as a matter of political theory, it is not the law. The Equal Protection Clause of the Fourteenth Amendment does not

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altered the form of Mobile's municipal government have been defeated in the state legislature, including at least one that would have permitted Mobile to govern itself through a Mayor and City Council with members elected from individual districts within the city. Whether it may be possible ultimately to prove that Mobile's present governmental and electoral system has been retained for a racially discriminatory purpose, we are in no position now to say.

[22] The dissenting opinion seeks to disclaim this description of its theory by suggesting that a claim of vote dilution may require, in addition to proof of electoral defeat, some evidence of "historical and social factors" indicating that the group in question is without political influence. *Post,* at 111–112, n. 7, 122–124. Putting to the side the evident fact that these gauzy sociological considerations have no constitutional basis, it remains far from certain that they could, in any principled manner, exclude the claims of any discrete political group that happens, for whatever reason, to elect fewer of its candidates than arithmetic indicates it might. Indeed, the putative limits are bound to prove illusory if the express purpose informing their application would be, as the dissent assumes, to redress the "inequitable distribution of political influence." *Post,* at 122.

require proportional representation as an imperative of political organization. The entitlement that the dissenting opinion assumes to exist simply is not to be found in the Constitution of the United States.

It is of course true that a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional. See *Shapiro* v. *Thompson,* 394 U. S. 618, 634, 638; *id.,* at 642–644 (concurring opinion). See also *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S. 1, 17, 30–32. But plainly "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws," *id.,* at 33. See *Lindsey* v. *Normet,* 405 U. S. 56, 74; *Dandridge* v. *Williams,* 397 U. S. 471, 485. Accordingly, where a state law does not impair a right or liberty protected by the Constitution, there is no occasison to depart from "the settled mode of constitutional analysis of legislat[ion] . . . involving questions of economic and social policy." *San Antonio Independent School Dist.* v. *Rodriguez, supra,* at 33.[23] MR. JUSTICE MARSHALL's dissenting opinion would discard these fixed principles in favor of a judicial inventiveness that would go "far toward making this Court a 'super-legislature.'" *Shapiro* v. *Thompson, supra,* at 655, 661 (Harlan, J., dissenting). We are not free to do so.

More than 100 years ago the Court unanimously held that "the Constitution of the United States does not confer the right of suffrage upon any one. . . ." *Minor* v. *Happersett,* 21 Wall. 162, 178. See *Lassiter* v. *Northampton Election Bd.,* 360 U. S., at 50–51. It is for the States "to determine the conditions under which the right of suffrage may be exercised . . . , absent of course the discrimination which the Constitution condemns," *ibid.* It is true, as the dissenting opinion states, that the Equal Protection Clause confers a substantive right to participate in elections on an equal basis with other qualified voters. See *Dunn* v. *Blumstein,* 405 U. S. 330, 336; *Reynolds* v. *Sims,* 377 U. S., at 576. But this right to equal participation in the electoral process does not protect any "political group," however defined, from electoral defeat.[24]

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[23] The presumption of constitutional validity that underlies the settled mode of reviewing legislation disappears, of course, if the law under consideration creates classes that, in a constitutional sense, are inherently "suspect." See *McLaughlin* v. *Florida,* 379 U. S. 184; *Strauder* v. *West Virginia,* 100 U. S. 303. Cf. *Lockport* v. *Citizens for Community Action,* 430 U. S. 259.

The dissenting opinion erroneously discovers the asserted entitlement to group representation within the "one person, one vote" principle of *Reynolds* v. *Sims, supra,* and its progeny.[25] Those cases established that the Equal Protection

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[24] The basic fallacy in the dissenting opinion's theory is illustrated by analogy to a defendant's right under the Sixth and Fourteenth Amendments to a trial by a jury of his peers in a criminal case. See *Duncan* v. *Louisiana,* 391 U. S. 145. That right, expressly conferred by the Constitution, is certainly "fundamental" as that word is used in the dissenting opinion. Moreover, under the Equal Protection Clause, a defendant has a right to require that the State not exclude from the jury members of his race. See *Castaneda* v. *Partida,* 430 U. S., at 493. But "[f]airness in selection has never been held to require proportional representation of races upon a jury," *Akins* v. *Texas,* 325 U. S. 398, 403; nor has the defendant any "right to demand that members of his race be included," *Alexander* v. *Louisiana,* 405 U. S. 625, 628. The absence from a jury of persons belonging to racial or other cognizable groups offends the Constitution only "if it results from purposeful discrimination." *Castaneda* v. *Partida, supra,* at 493. See *Alexander* v. *Louisiana, supra;* see also *Washington* v. *Davis,* 426 U. S., at 239–240. Thus, the fact that there is a constitutional right to a system of jury selection that is not purposefully exclusionary does not entail a right to a jury of any particular racial composition. Likewise, the fact that the Equal Protection Clause confers a right to participate in elections on an equal basis with other qualified voters does not entail a right to have one's candidates prevail.

[25] The dissenting opinion also relies upon several decisions of this Court that have held constitutionally invalid various voter eligibility requirements: *Dunn* v. *Blumstein,* 405 U. S. 330 (length of residence requirement); *Evans* v. *Cornman,* 398 U. S. 419 (exclusion of residents of federal property); *Kramer* v. *Union School District,* 395 U. S. 621 (property

Clause guarantees the right of each voter to "have his vote weighted equally with those of all other citizens." 377 U. S., at 576. The Court recognized that a voter's right to "have an equally effective voice" in the election of representatives is impaired where representation is not apportioned substantially on a population basis. In such cases, the votes of persons in more populous districts carry less weight than do those of persons in smaller districts. There can be, of course, no claim that the "one person, one vote" principle has been violated in this case, because the city of Mobile is a unitary electoral district and the Commission elections are conducted at large. It is therefore obvious that nobody's vote has been "diluted" in the sense in which that word was used in the *Reynolds* case.

The dissenting opinion places an extraordinary interpretation on these decisions, an interpretation not justified by *Reynolds* v. *Sims* itself or by any other decision of this Court. It is, of course, true that the right of a person to vote on an equal basis with other voters draws much of its significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation.[26] And the Court's decisions hold squarely

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or status requirement); *Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663 (poll tax requirement). But there is in this case no attack whatever upon any of the voter eligibilty requirements in Mobile. Nor do the cited cases contain implicit support for the position of the dissenting opinion. They stand simply for the proposition that "if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Kramer* v. *Union School District, supra,* at 627. It is difficult to perceive any similarity between the excluded person's right to equal electoral participation in the cited cases, and the right asserted by the dissenting opinion in the present case, aside from the fact that they both in some way involve voting.

[26] It is difficult to perceive how the implications of the dissenting opin-

that they do not. See *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 166–167; *id.*, at 179–180 (opinion concurring in judgment); *White* v. *Regester*, 412 U. S., at 765–766; *Whitcomb* v. *Chavis*, 403 U. S., at 149–150, 153–154, 156–157.

The fact is that the Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation. In *Whitcomb* v. *Chavis*, *supra*, the trial court had found that a multimember state legislative district had invidiously deprived Negroes and poor persons of rights guaranteed them by the Constitution, notwithstanding the absence of any evidence whatever of discrimination against them. Reversing the trial court, this Court said:

> "The District Court's holding, although on the facts of this case limited to guaranteeing one racial group representation, is not easily contained. It is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and repre-

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ion's theory of group representation could rationally be cabined. Indeed, certain preliminary practical questions immediately come to mind: Can only members of a minority of the voting population in a particular municipality be members of a "political group"? How large must a "group" be to be a "political group"? Can any "group" call itself a "political group"? If not, who is to say which "groups" are "political groups"? Can a qualified voter belong to more than one "political group"? Can there be more than one "political group" among white voters (*e. g.*, Irish-American, Italian-American, Polish-American, Jews, Catholics, Protestants)? Can there be more than one "political group" among nonwhite voters? Do the answers to any of these questions depend upon the particular demographic composition of a given city? Upon the total size of its voting population? Upon the size of its governing body? Upon its form of government? Upon its history? Its geographic location? The fact that even these preliminary questions may be largely unanswerable suggests some of the conceptual and practical fallacies in the constitutional theory espoused by the dissenting opinion, putting to one side the total absence of support for that theory in the Constitution itself.

> sents a majority living in an area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote. There are also union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas. Indeed, it would be difficult for a great many, if not most, multi-member districts to survive analysis under the District Court's view unless combined with some voting arrangement such as proportional representation or cumulative voting aimed at providing representation for minority parties or interests. At the very least, affirmance of the District Court would spawn endless litigation concerning the multi-member district systems now widely employed in this country." *Whitcomb* v. *Chavis, supra,* at 156–157 (footnotes omitted).

V

The judgment is reversed, and the case is remanded to the Court of Appeals for further proceedings.

It is so ordered.

MR. JUSTICE BLACKMUN, concurring in the result.

Assuming that proof of intent is a prerequisite to appellees' prevailing on their constitutional claim of vote dilution, I am inclined to agree with MR. JUSTICE WHITE that, in this case, "the findings of the District Court amply support an inference of purposeful discrimination," *post,* at 103. I concur in the Court's judgment of reversal, however, because I believe that the relief afforded appellees by the District Court was not commensurate with the sound exercise of judicial discretion.

It seems to me that the city of Mobile, and its citizenry, have a substantial interest in maintaining the commission form of government that has been in effect there for nearly 70 years. The District Court recognized that its remedial order, changing the form of the city's government to a mayor-council system, "raised serious constitutional issues." 423 F. Supp. 384, 404 (SD Ala. 1976). Nonetheless, the court was "unable to see how the impermissibly unconstitutional dilution can be effectively corrected by any other approach." *Id.*, at 403.

The Court of Appeals approved the remedial measures adopted by the District Court and did so essentially on three factors: (1) this Court's preference for single-member districting in court-ordered legislative reapportionment, absent special circumstances, see, *e. g., Connor* v. *Finch,* 431 U. S. 407, 415 (1977); (2) appellants' noncooperation with the District Court's request for the submission of proposed municipal government plans that called for single-member districts for councilmen, under a mayor-council system of government; and (3) the temporary nature of the relief afforded by the District Court, the city or State being free to adopt a "constitutional replacement" for the District Court's plan in the future. 571 F. 2d 238, 247 (CA5 1978).

Contrary to the Court of Appeals, I believe that special circumstances are presented when a District Court "reapportions" a municipal government by altering its basic structures. See also the opinion of MR. JUSTICE STEWART, *ante,* at 70, and n. 15. See *Chapman* v. *Meier,* 420 U. S. 1, 20, n. 14 (1975); *Sixty-Seventh Minnesota State Senate* v. *Beens,* 406 U. S. 187 (1972). I also believe that the city's failure to submit a proposed plan to the District Court was excused by the fact that the only proposals the court was interested in receiving were variations on a mayor-council plan utilizing single-member districts. Finally, although the District Court's order may have been temporary, it was unlikely that the courts below would have approved any attempt by Mobile to return to the commission form of government. And even a temporary alteration of a long-established form of municipal government is a drastic measure for a court to take.

Contrary to the District Court, I do not believe that, in order to remedy the unconstitutional vote dilution it found, it was necessary to convert Mobile's city government to a mayor-council system. In my view, the District Court at least should have considered alternative remedial orders that would have maintained some of the basic elements of the commission system Mobile long ago had selected—joint exercise of legislative and executive power, and citywide representation. In the first place, I see no reason for the court to have separated legislative and executive power in the city of Mobile by creating the office of mayor. In the second place, the court could have, and in my view should have, considered expanding the size of the Mobile City Commission and providing for the election of at least some commissioners at large. Alternative plans might have retained at-large elections for all commissioners while imposing district residency requirements that would have insured the election of a commission that was a cross section of all of Mobile's neighborhoods, or a plurality-win system that would have provided the potential for the effective use of single-shot voting by black voters. See *City of Rome* v. *United States, post,* at 184, n. 19. In failing to consider such alternative plans, it appears to me that the District Court was perhaps overly concerned with the elimination of at-large elections *per se,* rather than with structuring an electoral system that provided an opportunity for black voters in Mobile to participate in the city's government on an equal footing with whites.

In the past, this Court has emphasized that a district court's remedial power "may be exercised only on the basis of a constitutional violation," and that "the nature of the violation determines the scope of the remedy." *Swann* v. *Board of Education,* 402 U. S. 1, 16 (1971). I am not convinced that any violation of federal constitutional rights established by appellees required the District Court to dismantle Mobile's commission form of government and replace it with a mayor-council system. Accordingly, I, too, would reverse the judgment of the Court of Appeals, and remand the case for reconsideration of an appropriate remedy.

MR. JUSTICE STEVENS, concurring in the judgment.

At issue in this case is the constitutionality of the city of Mobile's commission form of government. Black citizens in Mobile, who constitute a minority of that city's registered voters, challenged the at-large nature of the elections for the three positions of City Commissioner, contending that the system "dilutes" their votes in violation of the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment. While I agree with MR. JUSTICE STEWART that no violation of respondents' constitutional rights has been demonstrated, my analysis of the issue proceeds along somewhat different lines.

In my view, there is a fundamental distinction between state action that inhibits an individual's right to vote and state action that affects the political strength of various groups that compete for leadership in a democratically governed community. That distinction divides so-called vote dilution practices into two different categories "governed by entirely different constitutional considerations," see *Wright* v. *Rockefeller,* 376 U. S. 52, 58 (Harlan, J., concurring).

In the first category are practices such as poll taxes or literacy tests that deny individuals access to the ballot. Districting practices that make an individual's vote in a heavily populated district less significant than an individual's vote in a smaller district also belong in that category. See *Baker* v. *Carr,* 369 U. S. 186; *Reynolds* v. *Sims,* 377 U. S. 533.[1] Such practices must be tested by the strictest of constitutional standards, whether challenged under the Fifteenth Amendment or under the Equal Protection Clause of the Fourteenth Amendment. See, *e. g., Dunn* v. *Blumstein,* 405 U. S. 330, 337.

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[1] In *Reynolds* v. *Sims,* the Court quoted Mr. Justice Douglas' statement that the right to vote "includes the right to have the vote counted at full value without dilution or discount . . . ," 377 U. S., at 555, n. 29, as well as the comment in *Wesberry* v. *Sanders,* 376 U. S. 1, 8, that " 'one

This case does not fit within the first category. The District Court found that black citizens in Mobile "register and vote without hindrance"[2] and there is no claim that any individual's vote is worth less than any other's. Rather, this case draws into question a political structure that treats all individuals as equals but adversely affects the political strength of a racially identifiable group. Although I am satisfied that such a structure may be challenged under the Fifteenth Amendment as well as under the Equal Protection Clause of the Fourteenth Amendment,[3] I believe that under

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man's vote in a congressional election is to be worth as much as another's.'" 377 U. S., at 559.

[2] This finding distinguishes this case from *White* v. *Regester,* 412 U. S. 755. In *White* the Court held that, in order to establish a Fourteenth Amendment violation, a group alleging vote dilution must

"produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.,* at 766.

The Court affirmed a judgment in favor of black and Mexican-American voters on the basis of the District Court's express findings that black voters had been "'effectively excluded from participation in the Democratic primary selection process,'" *id.,* at 767, and that "'. . . cultural incompatibility . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation ha[d] operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary.'" *Id.,* at 768.

[3] Thus, I disagree with MR. JUSTICE STEWART's conclusion for the plurality that the Fifteenth Amendment applies only to practices that directly affect access to the ballot and hence is totally inapplicable to the case at bar. *Ante,* at 65. I also find it difficult to understand why, given this position, he reaches out to decide that discriminatory purpose must be demonstrated in a proper Fifteenth Amendment case. *Ante,* at 61-64.

either provision it must be judged by a standard that allows the political process to function effectively.

My conclusion that the Fifteenth Amendment applies to a case such as this rests on this Court's opinion in *Gomillion* v. *Lightfoot,* 364 U. S. 339. That case established that the Fifteenth Amendment does not simply guarantee the individual's right to vote; it also limits the States' power to draw political boundaries. Although *Gomillion* involved a districting structure that completely excluded the members of one race from participation in the city's elections,[4] it does not stand for the proposition that no racial group can prevail on a Fifteenth Amendment claim unless it proves that an electoral system has the effect of making its members' right to vote, in MR. JUSTICE MARSHALL's words, "nothing more than the right to cast meaningless ballots." *Post,* at 104. I agree with MR. JUSTICE MARSHALL that the Fifteenth Amendment need not and should not be so narrowly construed. I do not agree, however, with his view that every "showing of discriminatory impact" on a historically and socially disadvantaged racial group, *post*, at 104, 111, n. 7, is sufficient to invalidate a districting plan.[5]

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[4] "The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords. When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens.

. . . . .

"According to the allegations here made, the Alabama Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." 364 U. S., at 346, 347.

Neither *Gomillion* nor any other case decided by this Court establishes a constitutional right to proportional representation for racial minorities.[6] What *Gomillion* holds is that a sufficiently "uncouth" or irrational racial gerrymander violates the Fifteenth Amendment. As Mr. Justice Whittaker's concurrence in that case demonstrates, the same result is compelled by the Equal Protection Clause of the Fourteenth Amendment. See 364 U. S., at 349. The fact that the "gerrymander" condemned in *Gomillion* was equally vulnerable under both Amendments indicates that the essential holding of that case is applicable, not merely to gerrymanders directed against racial minorities, but to those aimed at religious, ethnic, economic, and political groups as well. Whatever the proper standard for identifying an unconstitutional gerrymander may be, I have long been persuaded that it must apply equally to all forms of political gerrymandering—not just to racial gerrymandering. See *Cousins* v. *City Council*

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[5] I also disagree with MR. JUSTICE MARSHALL to the extent that he implies that the votes cast in an at-large election by members of a racial minority can never be anything more than "meaningless ballots." I have no doubt that analyses of Presidential, senatorial and other statewide elections would demonstrate that ethnic and racial minorities have often had a critical impact on the choice of candidates and the outcome of elections. There is no reason to believe that the same political forces cannot operate in smaller election districts regardless of the depth of conviction or emotion that may separate the partisans of different points of view.

[6] And this is true regardless of the apparent need of a particular group for proportional representation because of its historically disadvantaged position in the community. See *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 852 (CA7 1972) (Stevens, J., dissenting), cert. denied, 409 U. S. 893. This does not mean, of course, that a legislature is constitutionally prohibited from according some measure of proportional representation to a minority group, see *United Jewish Organizations* v. *Carey*, 430 U. S. 144.

of Chicago, 466 F. 2d 830, 848–852 (CA7 1972) (Stevens, J., dissenting), cert. denied, 409 U. S. 893.[7]

This conclusion follows, I believe, from the very nature of a gerrymander. By definition, gerrymandering involves drawing district boundaries (or using multimember districts or at-large elections) in order to maximize the voting strength of those loyal to the dominant political faction and to minimize the strength of those opposed to it.[8] 466 F. 2d, at 847. In seeking the desired result, legislators necessarily make judgments about the probability that the members of certain identifiable groups, whether racial, ethnic, economic, or religious, will vote in the same way. The success of the gerrymander from the legislators' point of view, as well as its impact on the disadvantaged group, depends on the accuracy of those predictions.

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[7] This view is consistent with the Court's Fourteenth Amendment cases, in which it has indicated that attacks on apportionment schemes on racial, political, or economic grounds should all be judged by the same constitutional standard. See, *e. g., Whitcomb* v. *Chavis,* 403 U. S. 124, 149 (districts that are "conceived or operated as purposeful devices to further racial *or economic* discrimination" are prohibited by the Fourteenth Amendment) (emphasis supplied); *Fortson* v. *Dorsey,* 379 U. S. 433, 439 (an apportionment scheme would be invalid under the Fourteenth Amendment if it "operate[d] to minimize or cancel out the voting strength of racial *or political* elements of the voting population") (emphasis supplied).

[8] Gerrymanders may also be used to preserve the current balance of power between political parties, see, *e. g., Gaffney* v. *Cummings,* 412 U. S. 735, or to preserve the safe districts of incumbents, cf. *Wright* v. *Rockefeller,* 376 U. S. 52. In *Gaffney* the Court pointed out: "[I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences." 412 U. S., at 753.

A prediction based on a racial characteristic is not necessarily more reliable than a prediction based on some other group characteristic. Nor, since a legislator's ultimate purpose in making the prediction is political in character, is it necessarily more invidious or benign than a prediction based on other group characteristics.[9] In the line-drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders.

From the standpoint of the groups of voters that are affected by the line-drawing process, it is also important to recognize that it is the group's interest in gaining or maintaining political power that is at stake. The mere fact that a number of citizens share a common ethnic, racial, or religious background does not create the need for protection against gerrymandering. It is only when their common interests are strong enough to be manifested in political action that the need arises. For the political strength of a group is not a function of its ethnic, racial, or religious composition; rather, it is a function of numbers—specifically the number of persons who will vote in the same way In the long run there is no more certainty that individual members of racial groups will vote alike than that members of other identifiable groups will do so. And surely there is no national interest in creating an incentive to define political groups by racial characteristics.[10]

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[9] Thus, for example, there is little qualitative difference between the motivation behind a religious gerrymander designed to gain votes on the abortion issue and a racial gerrymander designed to gain votes on an economic issue.

[10] As Mr. Justice Douglas wrote in his dissent in *Wright* v. *Rockefeller*:

"Racial electoral registers, like religious ones, have no place in a society that honors the Lincoln tradition—'of the people, by the people, for the people.' Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B

But if the Constitution were interpreted to give more favorable treatment to a racial minority alleging an unconstitutional impairment of its political strength than it gives to other identifiable groups making the same claim, such an incentive would inevitably result.

My conclusion that the same standard should be applied to racial groups as is applied to other groups leads me also to

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must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. Cf. *Gray* v. *Sanders*, 372 U. S. 368, 379. The racial electoral register system weights votes along one racial line more heavily than it does other votes. That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense. Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines.

. . . . .

"When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here." 376 U. S., at 66-67.

See also my dissent in *Cousins, supra:*

"In my opinion an interpretation of the Constitution which afforded one kind of political protection to blacks and another kind to members of other identifiable groups would itself be invidious. Respect for the citizenry in the black community compels acceptance of the fact that in the long run there is no more certainty that these individuals will vote alike than will individual members of any other ethnic, economic, or social group. The probability of parallel voting fluctuates as the blend of political issues affecting the outcome of an election changes from time to time to emphasize one issue, or a few, rather than others, as dominant. The facts that a political group has its own history, has suffered its own special injustices, and has its own congeries of special political interests, do not make one such group different from any other in the eyes of the law. The members of each go to the polls with equal dignity and with an equal right to be protected from invidious discrimination." 466 F. 2d, at 852.

conclude that the standard cannot condemn every adverse impact on one or more political groups without spawning more dilution litigation than the judiciary can manage. Difficult as the issues engendered by *Baker* v. *Carr,* 369 U. S. 186, may have been, nothing comparable to the mathematical yardstick used in apportionment cases is available to identify the difference between permissible and impermissible adverse impacts on the voting strength of political groups.

In its prior cases the Court has phrased the standard as being whether the districting practices in question "unconstitutionally operate to dilute or cancel the voting strength of racial or political elements." *Whitcomb* v. *Chavis,* 403 U. S. 124, 144. In *Zimmer* v. *McKeithen,* 485 F. 2d 1297 (CA5 1973), aff'd on other grounds *sub nom. East Carroll Parish School Bd.* v. *Marshall,* 424 U. S. 636, the Fifth Circuit attempted to outline the types of proof that would satisfy this rather amorphous test. Today, the plurality rejects the *Zimmer* analysis, holding that the primary, if not the sole, focus of the inquiry must be on the intent of the political body responsible for making the districting decision. While I agree that the *Zimmer* analysis should be rejected, I do not believe that it is appropriate to focus on the subjective intent of the decisionmakers.

In my view, the proper standard is suggested by three characteristics of the gerrymander condemned in *Gomillion:* (1) the 28-sided configuration was, in the Court's word, "uncouth," that is to say, it was manifestly not the product of a routine or a traditional political decision; (2) it had a significant adverse impact on a minority group; and (3) it was unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority. These characteristics suggest that a proper test should focus on the objective effects of the political decision rather than the subjective motivation of the decisionmaker. See *United States* v. *O'Brien,* 391 U. S.

367, 384.[11] In this case, if the commission form of government in Mobile were extraordinary, or if it were nothing more than a vestige of history, with no greater justification than the grotesque figure in *Gomillion,* it would surely violate the Constitution. That conclusion would follow simply from its adverse impact on black voters plus the absence of any legitimate justification for the system, without reference to the subjective intent of the political body that has refused to alter it.

Conversely, I am also persuaded that a political decision that affects group voting rights may be valid even if it can be proved that irrational or invidious factors have played some part in its enactment or retention.[12] The standard for testing the acceptability of such a decision must take into account the fact that the responsibility for drawing political boundaries is generally committed to the legislative process and that the process inevitably involves a series of compromises among different group interests. If the process is to work, it must reflect an awareness of group interests and it must tolerate some attempts to advantage or to disadvantage particular segments of the voting populace. Indeed, the same "group interest" may simultaneously support and oppose a particular boundary change.[13] The standard cannot, therefore, be so strict that any evidence of a purpose to disadvantage a bloc of voters will justify a finding of "invidious discrimination"; otherwise, the facts of political life would deny legislatures the right to perform the districting function. Accordingly, a political decision that is supported by valid and articulable justifications cannot be invalid simply because some participants in the decisionmaking process were motivated by a purpose to disadvantage a minority group.

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[11] In *O'Brien* the Court described *Gomillion* as standing "not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional."

[12] "It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it." *Washington* v. *Davis,* 426 U. S. 229, 253 (STEVENS, J., concurring).

[13] For example, if 55% of the voters in an area comprising two districts belong to group A, their interests in electing two representatives would be best served by evenly dividing the voters in two districts, but their inter-

The decision to retain the commission form of government in Mobile, Ala., is such a decision. I am persuaded that some support for its retention comes, directly or indirectly, from members of the white majority who are motivated by a desire to make it more difficult for members of the black minority to serve in positions of responsibility in city government. I deplore that motivation and wish that neither it nor any other irrational prejudice played any part in our political processes. But I do not believe otherwise legitimate political choices can be invalidated simply because an irrational or invidious purpose played some part in the decisionmaking process.

As MR. JUSTICE STEWART points out, Mobile's basic election system is the same as that followed by literally thousands of municipalities and other governmental units throughout the Nation. *Ante*, at 60.[14] The fact that these at-large systems

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ests in making sure that they elect at least one representative would be served by concentrating a larger majority in one district. See *Cousins* v. *City Council of Chicago*, 466 F. 2d, at 855, n. 30 (Stevens, J., dissenting). See also *Wright* v. *Rockefeller*, 376 U. S. 52, where the maintenance of racially separate congressional districts was challenged by one group of blacks and supported by another group having the dominant power in the black-controlled district.

[14] I emphasize this point because in my opinion there is a significant difference between a statewide legislative plan that "happens" to use multimember districts only in those areas where they disadvantage discrete minority groups and the use of a generally acceptable municipal form of government that involves the election of commissioners by the

characteristically place one or more minority groups at a significant disadvantage in the struggle for political power cannot invalidate all such systems. See *Whitcomb* v. *Chavis*, 403 U. S., at 156–160. Nor can it be the law that such systems are valid when there is no evidence that they were instituted or maintained for discriminatory reasons, but that they may be selectively condemned on the basis of the subjective motivation of some of their supporters. A contrary view "would spawn endless litigation concerning the multi-member district systems now widely employed in this country," *id.*, at 157, and would entangle the judiciary in a voracious political thicket.[15]

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voters at large. While it is manifest that there is a substantial neutral justification for a municipality's choice of a commission form of government, it is by no means obvious that an occasional multimember district in a State which typically uses single-member districts can be adequately explained on neutral grounds. Nothing in the Court's opinion in *White* v. *Regester*, 412 U. S. 755, describes any purported neutral explanation for the multimember districts in Bexar and Dallas Counties. In this connection, it should be remembered that *Kilgarlin* v. *Hill*, 386 U. S. 120, did not uphold the constitutionality of a "crazy quilt" of single-member and multimember districts; rather, in that case this Court merely upheld the findings by the District Court that the plaintiffs had failed to prove their allegations that the districting plan constituted such a crazy quilt.

[15] Rejection of Mr. Justice Frankfurter's views in the specific controversy presented by *Baker* v. *Carr*, 369 U. S. 186, does not refute the basic wisdom of his call for judicially manageable standards in this area: "Disregard of inherent limits in the effective exercise of the Court's 'judicial Power' not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of 'the supreme Law of the Land' in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements." *Id.*, at 267 (Frankfurter, J., dissenting).

In sum, I believe we must accept the choice to retain Mobile's commission form of government as constitutionally permissible even though that choice may well be the product of mixed motivation, some of which is invidious. For these reasons I concur in the judgment of reversal.

MR. JUSTICE BRENNAN, dissenting.*

I dissent because I agree with MR. JUSTICE MARSHALL that proof of discriminatory impact is sufficient in these cases. I also dissent because, even accepting the plurality's premise that discriminatory purpose must be shown, I agree with MR. JUSTICE MARSHALL and MR. JUSTICE WHITE that the appellees have clearly met that burden.

MR. JUSTICE WHITE, dissenting.

In *White* v. *Regester*, 412 U. S. 755 (1973), this Court unanimously held the use of multimember districts for the election of state legislators in two counties in Texas violated the Equal Protection Clause of the Fourteenth Amendment because, based on a careful assessment of the totality of the circumstances, they were found to exclude Negroes and Mexican-Americans from effective participation in the political processes in the counties. Without questioning the vitality of *White* v. *Regester* and our other decisions dealing with challenges to multimember districts by racial or ethnic groups, the Court today inexplicably rejects a similar holding based on meticulous factual findings and scrupulous application of the principles of these cases by both the District Court and the Court of Appeals. The Court's decision is flatly inconsistent with *White* v. *Regester* and it cannot be understood to flow from our recognition in *Washington* v. *Davis*, 426 U. S. 229 (1976), that the Equal Protection Clause forbids only purposeful discrimination. Both the District Court and the

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*[This opinion applies also to No. 78-357, *Williams et al.* v. *Brown et al., post,* p. 236.]

Court of Appeals properly found that an invidious discriminatory purpose could be inferred from the totality of facts in this case. The Court's cryptic rejection of their conclusions ignores the principles that an invidious discriminatory purpose can be inferred from objective factors of the kind relied on in *White* v. *Regester* and that the trial courts are in a special position to make such intensely local appraisals.

I

Prior to our decision in *White* v. *Regester,* we upheld a number of multimember districting schemes against constitutional challenges, but we consistently recognized that such apportionment schemes could constitute invidious discrimination "where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" *Whitcomb* v. *Chavis,* 403 U. S. 124, 143 (1971), quoting from *Fortson* v. *Dorsey,* 379 U. S. 433, 439 (1965); *Burns* v. *Richardson,* 384 U. S. 73, 88 (1966). In *Whitcomb* v. *Chavis, supra,* we noted that the fact that the number of members of a particular group who were legislators was not in proportion to the population of the group did not prove invidious discrimination absent evidence and findings that the members of the group had less opportunity than did other persons "to participate in the political processes and to elect legislators of their choice." 403 U. S., at 149.

Relying on this principle, in *White* v. *Regester* we unanimously upheld a District Court's conclusion that the use of multimember districts in Dallas and Bexar Counties in Texas violated the Equal Protection Clause in the face of findings that they excluded Negroes and Mexican-Americans from effective participation in the political processes. With respect to the exclusion of Negroes in Dallas County, "the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes." 412 U. S., at 766. The District Court also referred to Texas' majority vote requirement and "place" rule, "neither in themselves improper nor invidious," but which "enhanced the opportunity for racial discrimination" by reducing legislative elections from the multimember district to "a head-to-head contest for each position." *Ibid.* We deemed more fundamental the District Court's findings that only two Negro state representatives had been elected from Dallas County since Reconstruction and that these were the only two Negroes ever slated by an organization that effectively controlled Democratic Party candidate slating. *Id.*, at 766–767. We also noted the District Court's findings that the Democratic Party slating organization was insensitive to the needs and aspirations of the Negro community and that at times it had employed racial campaign tactics to defeat candidates supported by the black community. Based on this evidence, the District Court concluded that the black community generally was "not permitted to enter into the political process in a reliable and meaningful manner." *Id.*, at 767. We held that "[t]hese findings and conclusions are sufficient to sustain the District Court's judgment with respect to the Dallas multimember district and, on this record, we have no reason to disturb them." *Ibid.*

With respect to the exclusion of Mexican-Americans from the political process in Bexar County, the District Court referred to the continuing effects of a long history of invidious discrimination against Mexican-Americans in education, employment, economics, health, politics, and other fields. *Id.*, at 768. The impact of this discrimination, coupled with a cultural and language barrier, made Mexican-American participation in the political life of Bexar County extremely difficult. Only five Mexican-Americans had represented Bexar County in the Texas Legislature since 1880, and the county's legislative delegation "was insufficiently responsive to Mexican-American interests." *Id.*, at 769. "Based on the totality of the circumstances, the District Court evolved its ultimate assessment of the multimember district, overlaid, as it was, on the cultural and economic realities of the Mexican-American community in Bexar County and its relationship with the rest of the county." *Ibid.* "[F]rom its own special vantage point" the District Court concluded that the multimember district invidiously excluded Mexican-Americans from effective participation in the election of state representatives. We affirmed, noting that we were "not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise." *Id.*, at 769–770.

II

In the instant case the District Court and the Court of Appeals faithfully applied the principles of *White* v. *Regester* in assessing whether the maintenance of a system of at-large elections for the selection of Mobile City Commissioners denied Mobile Negroes their Fourteenth and Fifteenth Amendment rights. Scrupulously adhering to our admonition that "[t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question," *id.*, at 766, the District Court conducted a detailed factual inquiry into the openness of the candidate selection process to blacks. The court noted that "Mobile blacks were subjected to massive official and private racial discrimination until the Voting Rights Act of 1965" and that "[t]he pervasive effects of past discrimination still substantially affects black political participation." 423 F. Supp. 384, 387 (SD Ala. 1976). Although the District Court noted that "[s]ince the Voting Rights Act of 1965, blacks register and vote without hindrance," the court found that "local political processes are not equally open" to blacks. Despite the fact that Negroes constitute more than 35% of the population of Mobile, no Negro has ever been elected to the Mobile

City Commission. The plaintiffs introduced extensive evidence of severe racial polarization in voting patterns during the 1960's and 1970's with "white voting for white and black for black if a white is opposed to a black" resulting in the defeat of the black candidate or, if two whites are running, the defeat of the white candidate most identified with blacks. *Id.*, at 388. Regression analyses covering every city commission race in 1965, 1969, and 1973, both the primary and general election of the county commission in 1968 and 1972, selected school board races in 1962, 1966, 1970, 1972, and 1974, city referendums in 1963 and 1973, and a countywide legislative race in 1969 confirmed the existence of severe bloc voting. *Id.*, at 388–389. Nearly every active candidate for public office testified that because of racial polarization "it is highly unlikely that anytime in the foreseeable future, under the at-large system, . . . a black can be elected against a white." *Id.*, at 388. After single-member districts were created in Mobile County for state legislative elections, "three blacks of the present fourteen member Mobile County delegation have been elected." *Id.*, at 389. Based on the foregoing evidence, the District Court found "that the structure of the at-large election of city commissioners combined with strong racial polarization of Mobile's electorate continues to effectively discourage qualified black citizens from seeking office or being elected thereby denying blacks equal access to the slating or candidate selection process." *Ibid.*

The District Court also reviewed extensive evidence that the City Commissioners elected under the at-large system have not been responsive to the needs of the Negro community. The court found that city officials have been unresponsive to the interests of Mobile Negroes in municipal employment, appointments to boards and committees, and the provision of municipal services in part because of "the political fear of a white backlash vote when black citizens' needs are at stake." *Id.*, at 392. The court also found that there is no clear-cut state policy preference for at-large elections and that past discrimination affecting the ability of Negroes to register and to vote "has helped preclude the effective participation of blacks in the election system today." *Id.,* at 393. The adverse impact of the at-large election system on minorities was found to be enhanced by the large size of the citywide election district, the majority vote requirement, the provision that candidates run for positions by place or number, and the lack of any provision for at-large candidates to run from particular geographical subdistricts.

After concluding its extensive findings of fact, the District Court addressed the question of the effect of *Washington* v. *Davis,* 426 U. S. 229 (1976), on the *White* v. *Regester* standards. The court concluded that the requirement that a facially neutral statute involve purposeful discrimination before a violation of the Equal Protection Clause can be established was not inconsistent with *White* v. *Regester* in light of the recognition in *Washington* v. *Davis, supra,* at 241–242, that the discriminatory purpose may often be inferred from the totality of the relevant facts, including the discriminatory impact of the statute. 423 F. Supp., at 398. After noting that "whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected," *id.,* at 397, the District Court concluded that there was "a present purpose to dilute the black vote . . . resulting from intentional state legislative *inaction. . . .*" *Id.,* at 398. Based on an "exhaustive analysis of the evidence in the record," the court held that "[t]he plaintiffs have met the burden cast in *White* and *Whitcomb,*" and that "the multi-member at-large election of Mobile City Commissioners . . . results in an unconstitutional dilution of black voting strength." *Id.,* at 402.

The Court of Appeals affirmed the District Court's judgment in one of four consolidated "dilution" cases decided on the same day. *Bolden* v. *Mobile,* 571 F. 2d 238 (CA5 1978); *Nevett* v. *Sides,* 571 F. 2d 209 (CA5 1978) (*Nevett II*); *Blacks United for Lasting Leadership, Inc.* v. *Shreveport,* 571

F. 2d 248 (CA5 1978); *Thomasville Branch of NAACP* v. *Thomas County, Georgia,* 571 F. 2d 257 (CA5 1978). In the lead case of *Nevett II, supra,* the Court of Appeals held that under *Washington* v. *Davis, supra,* and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S. 252 (1977), "a showing of racially motivated discrimination is a necessary element" for a successful claim of unconstitutional voting dilution under either the Fourteenth or Fifteenth Amendment. 571 F. 2d, at 219. The court concluded that the standards for proving unconstitutional voting dilution outlined in *White* v. *Regester* were consistent with the requirement that purposeful discrimination be shown because they focus on factors that go beyond a simple showing that minorities are not represented in proportion to their numbers in the general population. 571 F. 2d, at 219–220, n. 13, 222–224.

In its decision in the instant case the Court of Appeals reviewed the District Court's findings of fact, found them not to be clearly erroneous and held that they "compel the inference that [Mobile's at-large] system has been maintained with the purpose of diluting the black vote, thus supplying the element of intent necessary to establish a violation of the fourteenth amendment, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U. S. 252 . . . (1977); *Washington* v. *Davis,* 426 U. S. 229 . . . (1976), and the fifteenth amendment, *Wright* v. *Rockefeller,* 376 U. S. 52 . . . (1964)." *Id.,* at 245. The court observed that the District Court's "finding that the legislature was acutely conscious of the racial consequences of its districting policies," coupled with the attempt to assign different functions to each of the three City Commissioners "to lock in the at-large feature of the scheme," constituted "direct evidence of the intent behind the maintenance of the at-large plan." *Id.,* at 246. The Court of Appeals concluded that "the district court has properly conducted the 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available' that a court must undertake in '[d]etermining whether invidious discriminatory purpose was a motivating factor' in the maintenance or enactment of a districting plan." *Ibid.*, quoting *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra,* at 266.

III

A plurality of the Court today agrees with the courts below that maintenance of Mobile's at-large system for election of City Commissioners violates the Fourteenth and Fifteenth Amendments only if it is motivated by a racially discriminatory purpose. The plurality also apparently reaffirms the vitality of *White* v. *Regester* and *Whitcomb* v. *Chavis,* which established the standards for determining whether at-large election systems are unconstitutionally discriminatory. The plurality nonetheless casts aside the meticulous application of the principles of these cases by both the District Court and the Court of Appeals by concluding that the evidence they relied upon "fell far short of showing" purposeful discrimination.

The plurality erroneously suggests that the District Court erred by considering the factors articulated by the Court of Appeals in *Zimmer* v. *McKeithen,* 485 F. 2d 1297 (CA5 1973), to determine whether purposeful discrimination has been shown. This remarkable suggestion ignores the facts that *Zimmer* articulated the very factors deemed relevant by *White* v. *Regester* and *Whitcomb* v. *Chavis*—a lack of minority access to the candidate selection process, unresponsiveness of elected officials to minority interests, a history of discrimination, majority vote requirements, provisions that candidates run for positions by place or number, the lack of any provision for at-large candidates to run from particular geographical subdistricts—and that both the District Court and the Court of Appeals considered these factors with the recognition that they are relevant only with respect to the question whether purposeful discrimination can be inferred.

Although the plurality does acknowledge that "the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose," it concludes that the evidence relied upon by the court below was "most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case." The plurality apparently bases this conclusion on the fact that there are no official obstacles barring Negroes from registering, voting, and running for office coupled with its conclusion that none of the factors relied upon by the courts below would alone be sufficient to support an inference of purposeful discrimination. The absence of official obstacles to registration, voting, and running for office heretofore has never been deemed to insulate an electoral system from attack under the Fourteenth and Fifteenth Amendments. In *White* v. *Regester,* 412 U. S. 755 (1973), there was no evidence that Negroes faced official obstacles to registration, voting, and running for office, yet we upheld a finding that they had been excluded from effective participation in the political process in violation of the Equal Protection Clause because a multimember districting scheme, in the context of racial voting at the polls, was being used invidiously to prevent Negroes from being elected to public office. In *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960), and *Terry* v. *Adams,* 345 U. S. 461 (1953), we invalidated electoral systems under the Fifteenth Amendment not because they erected official obstacles in the path of Negroes registering, voting, or running for office, but because they were used effectively to deprive the Negro vote of any value. Thus, even though Mobile's Negro community may register and vote without hindrance, the system of at-large election of City Commissioners may violate the Fourteenth and Fifteenth Amendments if it is used purposefully to exclude Negroes from the political process.

In conducting "an intensely local appraisal of the design and impact" of the at-large election scheme, *White* v. *Regester, supra,* at 769, the District Court's decision was fully consistent with our recognition in *Washington* v. *Davis,* 426 U. S., at 242, that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." Although the totality of the facts relied upon by the District Court to support its inference of purposeful discrimination is even more compelling than that present in *White* v. *Regester,* the plurality today rejects the inference of purposeful discrimination apparently because each of the factors relied upon by the courts below is alone insufficient to support the inference. The plurality states that the "fact [that Negro candidates have been defeated] alone does not work a constitutional deprivation," that evidence of the unresponsiveness of elected officials "is relevant only as the most tenuous and circumstantial evidence," that "the substantial history of official racial discrimination . . . [is] of limited help," and that the features of the electoral system that enhance the disadvantages faced by a voting minority "are far from proof that the at-large electoral scheme represents purposeful discrimination." By viewing each of the factors relied upon below in isolation, and ignoring the fact that racial bloc voting at the polls makes it impossible to elect a black commissioner under the at-large system, the plurality rejects the "totality of the circumstances" approach we endorsed in *White* v. *Regester, supra,* at 766–770, *Washington* v. *Davis, supra,* at 241–242, and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S., at 266, and leaves the courts below adrift on uncharted seas with respect to how to proceed on remand.

Because I believe that the findings of the District Court amply support an inference of purposeful discrimination in violation of the Fourteenth and Fifteenth Amendments, I respectfully dissent.

MR. JUSTICE MARSHALL, dissenting.*

The American ideal of political equality, conceived in the earliest days of our colonial existence and fostered by the

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*[This opinion applies also to No. 78-357, *Williams et al.* v. *Brown et al., post,* p. 236.]

egalitarian language of the Declaration of Independence, could not forever tolerate the limitation of the right to vote to white propertied males. Our Constitution has been amended six times in the movement toward a democracy for more than the few,[1] and this Court has interpreted the Fourteenth Amendment to provide that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," *Dunn* v. *Blumstein*, 405 U. S. 330, 336 (1972). The Court's decision today is in a different spirit. Indeed, a plurality of the Court concludes that, in the absence of proof of intentional discrimination by the State, the right to vote provides the politically powerless with nothing more than the right to cast meaningless ballots.

The District Court in both of these cases found that the challenged multimember districting schemes unconstitutionally diluted the Negro vote. These factual findings were upheld by the Court of Appeals, and the plurality does not question them. Instead, the plurality concludes that districting schemes do not violate the Equal Protection Clause unless it is proved that they were enacted or maintained for the purpose of minimizing or canceling out the voting potential of a racial minority. The plurality would require plaintiffs in vote-dilution cases to meet the stringent burden of establishing discriminatory intent within the meaning of *Washington* v. *Davis*, 426 U. S. 229 (1976); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977); and *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256 (1979). In my view, our vote-dilution decisions require only a showing of discriminatory impact to justify the invalidation of a multimember districting scheme, and, because they are premised on the fundamental interest in voting protected by the Fourteenth Amendment, the discriminatory-impact standard adopted by them is unaffected by *Washington* v. *Davis*, *supra*, and its progeny. Furthermore, an intent requirement is inconsistent with the protection against denial or abridgment of the vote on account of race embodied in the Fifteenth Amendment and in § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. § 1973.[2] Even if, however, proof of discriminatory intent were necessary to support a vote-dilution claim, I would impose upon the plaintiffs a standard of proof less rigid than that provided by *Personnel Administrator of Mass.* v. *Feeney, supra.*

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[1] U. S. Const., Amdts. 15, 17, 19, 23, 24, 26.

I

The Court does not dispute the proposition that multimember districting can have the effect of submerging electoral minorities and overrepresenting electoral majorities.[3] It is for this reason that we developed a strong preference for single-member districting in court-ordered reapportionment plans. See *ante,* at 66, n. 12. Furthermore, and more important for present purposes, we decided a series of vote-dilution cases under the Fourteenth Amendment that were designed to protect electoral minorities from precisely the combination of electoral laws and historical and social factors found in the present cases.[4] In my view, the plurality's treatment of

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[2] I agree with the plurality, see *ante,* at 60–61, that the prohibition on denial or infringement of the right to vote contained in § 2 of the Voting Rights Act, 42 U. S. C. § 1973, contains the same standard as the Fifteenth Amendment. I disagree with the plurality's construction of that Amendment, however. See Part II, *infra.*

[3] The Court does not quarrel with the generalization that in many instances an electoral minority will fare worse under multimember districting than under single-member districting. Multimember districting greatly enhances the opportunity of the majority political faction to elect all representatives of the district. In contrast, if the multimember district is divided into several single-member districts, an electoral minority will have a better chance to elect a candidate of its choice, or at least to exert greater political influence. It is obvious that the greater the degree to which the electoral minority is homogeneous and insular and the greater the degree that bloc voting occurs along majority-minority lines, the greater will be the extent to which the minority's voting power is diluted by multimember districting. See E. Banfield & J. Wilson, City Politics 91–96, 303–308 (1963); R. Dixon, Jr., Democratic Representation 12, 476–484, 503–527 (1968); Bonapfel, Minority Challenges to At-Large Elections: The Dilution Problem, 10 Ga. L. Rev. 353, 358–360 (1976); Derfner, Racial Discrimination and the Right to Vote, 26 Vand. L. Rev. 523, 553–555 (1973); Comment, Effective Representation and Multimember Districts, 68 Mich. L. Rev. 1577, 1577–1579 (1970). Recent empirical studies have documented the validity of this generalization. See Berry & Dye, The Discriminatory Effects of At-Large Elections, 7 Fla. St. U. L. Rev. 85, 113–122 (1979); Jones, The Impact of Local Election Systems on Black

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Political Representation, 11 Urb. Aff. Q. 345 (1976); Karnig, Black Resources and City Council Representation, 41 J. Pol. 134 (1979); Karnig, Black Representation on City Councils: The Impact of District Elections and Socioeconomic Factors, 12 Urb. Aff. Q. 223 (1976); Sloan, "Good Government" and the Politics of Race, 17 Soc. Prob. 161 (1969); The Impact of Municipal Reformism: A Symposium, 59 Soc. Sci. Q. 117 (1978).

The electoral schemes in these cases involve majority-vote, numbered-post, and staggered-term requirements. See *Bolden* v. *City of Mobile,* 423 F. Supp. 384, 386–387 (SD Ala. 1976); *Brown* v. *Moore,* 428 F. Supp. 1123, 1126–1127 (SD Ala. 1976). These electoral rules exacerbate the vote-dilutive effects of multimember districting. A requirement that a candidate must win by a majority of the vote forces a minority candidate who wins a plurality of votes in the general election to engage in a runoff election with his nearest competitor. If the competitor is a member of the dominant political faction, the minority candidate stands little chance of winning in the second election. A requirement that each candidate must run for a particular "place" or "post" creates head-to-head contests that minority candidates cannot survive. When a number of positions on a governmental body are to be chosen in the same election, members of a minority will increase the likelihood of election of a favorite candidate by voting only for him. If the remainder of the electorate splits its votes among the other candidates, the minority's candidate might well be elected by the minority's "single-shot voting." If the terms of the officeholders are staggered, the opportunity for single-shot voting is decreased. See *City of Rome* v. *United States, post,* p. 156; *Zimmer* v. *McKeithen,* 485 F. 2d 1297, 1305 (CA5 1973) (en banc), aff'd on other grounds *sub nom. East Carroll Parish School Bd. v. Marshall,* 424 U. S. 636 (1976) (*per curiam*); Bonapfel, *supra;* Derfner, *supra.*

[4] The plurality notes that at-large elections were instituted in cities as a reform measure to correct corruption and inefficiency in municipal government, and suggests that it "may be a rash assumption" to apply vote-dilu-

these cases is fanciful. Although we have held that multimember districts are not unconstitutional *per se,* see *ante,* at 66, there is simply no basis for the plurality's conclusion that

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tion concepts to a municipal government elected in that fashion. See *ante,* at 70, and n. 15. To the contrary, local governments are not exempt from the constitutional requirement to adopt representational districting ensuring that the votes of each citizen will have equal weight. *Avery* v. *Midland County,* 390 U. S. 474 (1968). Indeed, in *Beer* v. *United States,* 425 U. S. 130, 142, n. 14 (1976), and *Abate* v. *Mundt,* 403 U. S. 182, 184, n. 2 (1971), we assumed that our vote-dilution doctrine applied to local governments.

Furthermore, though municipalities must be accorded some discretion in arranging their affairs, see *Abate* v. *Mundt, supra,* there is all the more reason to scrutinize assertions that municipal, rather than state, multimember districting dilutes the vote of an electoral minority:

> "In statewide elections, it is possible that a large minority group in one multi-member district will be unable to elect any legislators, while in another multi-member district where the same group is a slight majority, they will elect the entire slate of legislators. Thus, the multi-member electoral system may hinder a group in one district but prove an advantage in another. In at-large elections in cities this is not possible. There is no way to balance out the discrimination against a particular minority group because the entire city is one huge election district. The minority's loss is absolute." Berry & Dye, *supra* n. 3, at 87.

That at-large elections were instituted as part of a "reform" movement in no way ameliorates these harsh effects. Moreover, in some instances the efficiency and breadth of perspective supposedly resulting from a reform structure of municipal government are achieved at a high cost. In a white-majority city in which severe racial bloc voting is common, the citywide view allegedly inculcated in city commissioners by at-large elections need not extend beyond the white community, and the efficiency of the commission form of government can be achieved simply by ignoring the concerns of the powerless minority.

It would be a mistake, then, to conclude that municipal at-large elections provide an inherently superior representational scheme. See also n. 3, *supra; Chapman* v. *Meier,* 372 F. Supp. 371, 388–392 (ND 1974) (three-judge court) (Bright, J., dissenting), rev'd, 420 U. S. 1 (1975). It goes without saying that a municipality has the freedom to design its own governance system. When that system is subjected to constitutional attack, however, the question is whether it was enacted or maintained with under our prior cases proof of discriminatory intent is a necessary condition for the invalidation of multimember districting.

A

In *Fortson* v. *Dorsey*, 379 U. S. 433 (1965), the first vote-dilution case to reach this Court, we stated explicitly that such a claim could rest on either discriminatory purpose or effect:

> "It might well be that, *designedly or otherwise*, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would *operate* to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.*, at 439 (emphasis added).

We reiterated these words in *Burns* v. *Richardson*, 384 U. S. 73 (1966), interpreted them as the correct test to apply to vote-dilution claims, and described the standard as one involving "invidious effect," *id.*, at 88. We then held that the plaintiffs had failed to meet their burden of proof:

> "[T]he demonstration that a particular multi-member scheme *effects an invidious result* must appear from evidence in the record. . . . That demonstration was not made here. In relying on conjecture as to the effects of multi-member districting rather than demonstrated fact, the court acted in a manner more appropriate to the body responsible for drawing up the districting plan. Speculations do not supply evidence that the multi-member districting *was designed to have or had* the invidious effect necessary to a judgment of the unconstitutionality of the districting." *Id.*, at 88–89 (emphasis added) (footnote omitted).

It could not be plainer that the Court in *Burns* considered

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a discriminatory purpose or has a discriminatory effect, not whether it comports with one or another of the competing notions about "good government."

discriminatory effect a sufficient condition for invalidating a multimember districting plan.

In *Whitcomb* v. *Chavis,* 403 U. S. 124 (1971), we again repeated and applied the *Fortson* standard, 403 U. S., at 143, 144, but determined that the Negro community's lack of success at the polls was the result of partisan politics, not racial vote dilution. *Id.,* at 150–155. The Court stressed that both the Democratic and Republican Parties had nominated Negroes, and several had been elected. Negro candidates lost only when their entire party slate went down to defeat. *Id.,* at 150, nn. 29–30, 152–153. In addition, the Court was impressed that there was no finding that officials had been unresponsive to Negro concerns. *Id.,* at 152, n. 32, 155.[5]

More recently, in *White* v. *Regester,* 412 U. S. 755 (1973), we invalidated the challenged multimember districting plans because their characteristics, when combined with historical and social factors, had the discriminatory effect of denying the plaintiff Negroes and Mexican-Americans equal access to the political process. *Id.*, at 765–770. We stated that

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[5] As the plurality notes, see *ante,* at 66, we indicated in *Whitcomb* v. *Chavis,* 403 U. S., at 149, that multimember districts were unconstitutional if they were "conceived or operated as purposeful devices to further racial or economic discrimination." The Court in *Whitcomb* did not, however, suggest that discriminatory purpose was a necessary condition for the invalidation of multimember districting. Our decision in *Whitcomb, id.,* at 143, acknowledged the continuing validity of the discriminatory-impact test adopted in *Fortson* v. *Dorsey,* 379 U. S. 433, 439 (1965), and restated it as requiring plaintiffs to prove that "multi-member districts unconstitutionally *operate* to dilute or cancel the voting strength of racial or political elements." *Whitcomb* v. *Chavis, supra,* at 144 (emphasis added).

Abate v. *Mundt,* 403 U. S. 182 (1971), decided the same day as *Whitcomb,* provides further evidence that *Whitcomb* did not alter the discriminatory-effects standard developed in earlier cases. In *Abate, supra,* at 184, n. 2, we rejected the argument that a multimember districting scheme had a vote-dilutive effect because "[p]etitioners . . . have not shown that these multi-member districts, by themselves, operate to impair the voting strength of particular racial or political elements . . . , see *Burns* v. *Richardson,* 384 U. S. 73, 88 (1966)."

> "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.*, at 765–766.

We held that the three-judge District Court had properly applied this standard in invalidating the multimember districting schemes in the Texas counties of Dallas and Bexar. The District Court had determined that the characteristics of the challenged electoral systems—multimember districts, a majority-vote requirement for nomination in a primary election, and a rule mandating that a candidate running for a position in a multimember district must run for a specified "place" on the ticket—though "neither in themselves improper nor invidious," reduced the electoral influence of Negroes and Mexican-Americans. *Id.*, at 766.[6] The District Court identified a number of social and historical factors that, when combined with the Texas electoral structure, resulted in vote dilution: (1) a history of official racial discrimination in Texas, including discrimination inhibiting the registration, casting of ballots, and political participation of Negroes; (2) proof that minorities were still suffering the effects of past discrimination; (3) a history of gross underrepresentation of minority interests; (4) proof of official insensitivity to the needs of minority citizens, whose votes were not needed by those in power; (5) the recent use of racial campaign tactics; and (6) a cultural and language barrier inhibiting the participation of

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[6] See n. 3, *supra*.

Mexican-Americans. *Id.,* at 766–770. Based "on the totality of the circumstances," we affirmed the District Court's conclusion that the use of multimember districts excluded the plaintiffs "from effective participation in political life." *Id.,* at 769.[7]

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[7] *White* v. *Regester,* 412 U. S. 755 (1973), makes clear the distinction between the concepts of vote dilution and proportional representation. We have held that, in order to prove an allegation of vote dilution, the plaintiffs must show more than simply that they have been unable to elect candidates of their choice. See *id.,* at 765–766; *Whitcomb* v. *Chavis, supra,* at 149–150, 153. The Constitution, therefore, does not contain any requirement of proportional representation. Cf. *United Jewish Organizations* v. *Carey,* 430 U. S. 144 (1977); *Gaffney* v. *Cummings,* 412 U. S. 735 (1973). When all that is proved is mere lack of success at the polls, the Court will not presume that members of a political minority have suffered an impermissible dilution of political power. Rather, it is assumed that these persons have means available to them through which they can have some effect on governmental decisionmaking. For example, many of these persons might belong to a variety of other political, social, and economic groups that have some impact on officials. In the absence of evidence to the contrary, it may be assumed that officials will not be improperly influenced by such factors as the race or place of residence of persons seeking governmental action. Furthermore, political factions out of office often serve as watchdogs on the performance of the government, bind together into coalitions having enhanced influence, and have the respectability necessary to affect public policy.

Unconstitutional vote dilution occurs only when a discrete political minority whose voting strength is diminished by a districting scheme proves that historical and social factors render it largely incapable of effectively utilizing alternative avenues of influencing public policy. See n. 19, *infra.* In these circumstances, the only means of breaking down the barriers encasing the political arena is to structure the electoral districting so that the minority has a fair opportunity to elect candidates of its choice.

The test for unconstitutional vote dilution, then, looks only to the discriminatory effects of the combination of an electoral structure and historical and social factors. At the same time, it requires electoral minorities to prove far more than mere lack of success at the polls.

We have also spoken of dilution of voting power in cases arising under the Voting Rights Act of 1965, 42 U. S. C. § 1971 *et seq.* Under § 5 of

It is apparent that a showing of discriminatory intent in the creation or maintenance of multimember districts is as unnecessary after *White* as it was under our earlier vote-dilution decisions. Under this line of cases, an electoral districting plan is invalid if it has the effect of affording an electoral minority "less opportunity than . . . other residents in the district to participate in the political processes and to elect legislators of their choice," *id.*, at 766. It is also apparent that the Court in *White* considered equal access to the political process as meaning more than merely allowing the minority the opportunity to vote. *White* stands for the proposition that an electoral system may not relegate an electoral minority to political impotence by diminishing the importance of its vote. The plurality's approach requiring proof of discriminatory purpose in the present cases is, then, squarely contrary to *White* and its predecessors.[8]

B

The plurality fails to apply the discriminatory-effect standard of *White* v. *Regester* because that approach conflicts with what the plurality takes to be an elementary principle of law. "[O]nly if there is purposeful discrimination," announces the

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that Act, 42 U. S. C. § 1973c, a state or local government covered by the Act may not enact new electoral procedures having the purpose or effect of denying or abridging the right to vote on account of race or color. We have interpreted this provision as prohibiting *any* retrogression in Negro voting power. *Beer* v. *United States*, 425 U. S. 130, 141 (1976). In some cases, we have labeled such retrogression a "dilution" of the minority vote. See, *e. g.*, *City of Rome* v. *United States*, *post*, p. 156. Vote dilution under § 5, then, involves a standard different from that applied in cases such as *White* v. *Regester*, *supra*, in which diminution of the vote violating the Fourteenth or Fifteenth Amendment is alleged.

[8] The plurality's approach is also inconsistent with our statement in *Dallas County* v. *Reese*, 421 U. S. 477, 480 (1975) (*per curiam*), that multimember districting violates the Equal Protection Clause if it "in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population." See also *Chapman* v. *Meier*, 420 U. S., at 17.

plurality, "can there be a violation of the Equal Protection Clause of the Fourteenth Amendment." *Ante,* at 66. That proposition is plainly overbroad. It fails to distinguish between two distinct lines of equal protection decisions: those involving suspect classifications, and those involving fundamental rights.

We have long recognized that under the Equal Protection Clause classifications based on race are "constitutionally suspect," *Bolling* v. *Sharpe,* 347 U. S. 497, 499 (1954), and are subject to the "most rigid scrutiny," *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944), regardless of whether they infringe on an independently protected constitutional right. Cf. *University of California Regents* v. *Bakke,* 438 U. S. 265 (1978). Under *Washington* v. *Davis,* 426 U. S. 229 (1976), a showing of discriminatory purpose is necessary to impose strict scrutiny on facially neutral classifications having a racially discriminatory impact. Perhaps because the plaintiffs in the present cases are Negro, the plurality assumes that their vote-dilution claims are premised on the suspect-classification branch of our equal protection cases, and that under *Washington* v. *Davis, supra,* they are required to prove discriminatory intent. That assumption fails to recognize that our vote-dilution decisions are rooted in a different strand of equal protection jurisprudence.

Under the Equal Protection Clause, if a classification "impinges upon a fundamental right explicitly or implicitly protected by the Constitution, . . . strict judicial scrutiny" is required, *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S. 1, 17 (1973), regardless of whether the infringement was intentional.[9] As I will explain, our cases recognize a fundamental right to equal electoral participation that encompasses protection against vote dilution. Proof of discriminatory purpose is, therefore, not required to support a claim of vote dilution.[10] The plurality's erroneous conclusion to the contrary is the result of a failure to recognize the central distinction between *White* v. *Regester,* 412 U. S. 755 (1973), and *Washington* v. *Davis, supra:* the former involved an infringement of a constitutionally protected right, while the latter dealt with a claim of racially discriminatory distribution of an interest to which no citizen has a constitutional entitlement.[11]

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[9] See *Shapiro* v. *Thompson,* 394 U. S. 618 (1969) (right to travel); *Reynolds* v. *Sims,* 377 U. S. 533 (1964) (right to vote); *Douglas* v. *California,* 372 U. S. 353 (1963); and *Griffin* v. *Illinois,* 351 U. S. 12 (1956) (right to fair access to criminal process). Under the rubric of the fundamental right of privacy, we have recognized that individuals have freedom from unjustified governmental interference with personal decisions involv-

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ing marriage, *Zablocki* v. *Redhail,* 434 U. S. 374 (1978); *Loving* v. *Virginia,* 388 U. S. 1 (1967); procreation, *Skinner* v. *Okahoma ex rel. Williamson,* 316 U. S. 535 (1942); contraception, *Carey* v. *Population Services International,* 431 U. S. 678 (1977); *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965); abortion, *Roe* v. *Wade,* 410 U. S. 113 (1973); family relationships, *Prince* v. *Massachusetts,* 321 U. S. 158 (1944); and child rearing and education, *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923). See also *Moore* v. *East Cleveland,* 431 U. S. 494 (1977).

[10] As the present cases illustrate, a requirement of proof of discriminatory intent seriously jeopardizes the free exercise of the fundamental right to vote. Although the right to vote is indistinguishable for present purposes from the other fundamental rights our cases have recognized, see n. 9, *supra,* surely the plurality would not require proof of discriminatory purpose in those cases. The plurality fails to articulate why the right to vote should receive such singular treatment. Furthermore, the plurality refuses to recognize the disutility of requiring proof of discriminatory purpose in fundamental rights cases. For example, it would make no sense to require such a showing when the question is whether a state statute regulating abortion violates the right of personal choice recognized in *Roe* v. *Wade, supra.* The only logical inquiry is whether, regardless of the legislature's motive, the statute has the effect of infringing that right. See, *e. g., Planned Parenthood of Central Missouri* v. *Danforth,* 428 U. S. 52 (1976).

[11] Judge Wisdom of the Court of Appeals below recognized this distinction in a companion case, see *Nevett* v. *Sides,* 571 F. 2d 209, 231–234 (CA5 1978) (specially concurring opinion). See also Comment, Proof of

Nearly a century ago, the Court recognized the elementary proposition upon which our structure of civil rights is based: "[T]he political franchise of voting is . . . a fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 370 (1886). We reiterated that theme in our landmark decision in *Reynolds* v. *Sims,* 377 U. S. 533, 561–562 (1964), and stated that, because "the right of suffrage is a fundamental matter in a free and democratic society[,] . . . any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Ibid.* We realized that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.,* at 555. Accordingly, we recognized that the Equal Protection Clause protects "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens." *Id.,* at 576. See also *Wes-*

Racially Discriminatory Purpose Under the Equal Protection Clause: *Washington* v. *Davis, Arlington Heights, Mt. Healthy,* and *Williamsburgh,* 12 Harv. Civ. Rights-Civ. Lib. L. Rev. 725, 758, n. 175 (1977); Note, Racial Vote Dilution in Multimember Districts: The Constitutional Standard After *Washington* v. *Davis,* 76 Mich. L. Rev. 694, 722–726 (1978); Comment, Constitutional Challenges to Gerrymanders, 45 U. Chi. L. Rev. 845, 869–877 (1978).

Washington v. *Davis,* 426 U. S. 229 (1976), involved alleged racial discrimination in public employment. By describing interests such as public employment as constitutional gratuities, I do not, of course, mean to suggest that their deprivation is immune from constitutional scrutiny. Indeed, our decisions have referred to the importance of employment, see *Hampton* v. *Mow Sun Wong,* 426 U. S. 88, 116 (1976); *Meyer* v. *Nebraska, supra,* at 399; *Truax* v. *Raich,* 239 U. S. 33, 41 (1915), and we have explicitly recognized that in some circumstances public employment falls within the categories of liberty and property protected by the Fifth and Fourteenth Amendments, see, *e. g., Arnett* v. *Kennedy,* 416 U. S. 134 (1974); *Perry* v. *Sindermann,* 408 U. S. 593 (1972). The Court has not held, however, that a citizen has a constitutional right to public employment.

berry v. *Sanders,* 376 U. S. 1, 17 (1964); *Gray* v. *Sanders,* 372 U. S. 368, 379–380 (1963).[12]

Reynolds v. *Sims* and its progeny[13] focused solely on the discriminatory *effects* of malapportionment. They recognize that, when population figures for the representational districts of a legislature are not similar, the votes of citizens in larger districts do not carry as much weight in the legislature as do votes cast by citizens in smaller districts. The equal protection problem attacked by the "one person, one vote" principle is, then, one of vote dilution: under *Reynolds,* each citizen must have an "equally effective voice" in the election of representatives. *Reynolds* v. *Sims, supra,* at 565. In the present cases, the alleged vote dilution, though caused by the combined effects of the electoral structure and social and historical factors rather than by unequal population distribution, is analytically the same concept: the unjustified abridgment of a fundamental right.[14] It follows, then, that a showing of discriminatory intent is just as unnecessary under the vote-dilution approach adopted in *Fortson* v. *Dorsey,* 379 U. S. 433 (1965), and applied in *White* v. *Regester, supra,* as it is under our reapportionment cases.[15]

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[12] We have not, however, held that the Fourteenth Amendment contains an absolute right to vote. As we explained in *Dunn* v. *Blumstein,* 405 U. S. 330 (1972):

> "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. [Citing cases.] This 'equal right to vote' . . . is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. . . . But, as a general matter, 'before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.'" *Id.,* at 336 (quoting *Evans* v. *Cornman,* 398 U. S. 419, 426, 422 (1970)).

[13] *Avery* v. *Midland County,* 390 U. S. 474 (1968), applied the equal-representation standard of *Reynolds* v. *Sims* to local governments. See also, *e. g., Connor* v. *Finch,* 431 U. S. 407 (1977); *Lockport* v. *Citizens for Community Action,* 430 U. S. 259 (1977); *Hadley* v. *Junior College Dist.,* 397 U. S. 50 (1970).

[14] In attempting to limit *Reynolds* v. *Sims* to its facts, see *ante,* at 77–79, the plurality confuses the nature of the constitutional right recognized in that decision with the means by which that right can be violated. *Reynolds* held that under the Equal Protection Clause each citizen must

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be accorded an essentially equal voice in the election of representatives. The Court determined that unequal population distribution in a multi-district representational scheme was one readily ascertainable means by which this right was abridged. The Court certainly did not suggest, however, that violations of the right to effective political participation mattered only if they were caused by malapportionment. The plurality's assertion to the contrary in this case apparently would require it to read *Reynolds* as recognizing fair apportionment as an end in itself, rather than as simply a means to protect against vote dilution.

[15] Proof of discriminatory purpose has been equally unnecessary in our decisions assessing whether various impediments to electoral participation are inconsistent with the fundamental interest in voting. In the seminal case, *Harper* v. *Virginia Bd. of Elections,* 383 U. S. 663 (1966), we invalidated a $1.50 poll tax imposed as a precondition to voting. Relying on our decision two years earlier in *Reynolds* v. *Sims,* see *Harper, supra,* at 667–668, 670, we determined that "the right to vote is too precious, too fundamental to be so burdened or conditioned," 383 U. S., at 670. We analyzed the right to vote under the familiar standard that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Ibid.* In accord with *Harper,* we have applied heightened scrutiny in assessing the imposition of filing fees, *e. g., Lubin* v. *Panish,* 415 U. S. 709 (1974); limitations on who may participate in elections involving specialized governmental entities, *e. g., Kramer* v. *Union School District,* 395 U. S. 621 (1969); durational residency requirements, *e. g., Dunn* v. *Blumstein, supra;* enrollment time limitations for voting in party primary elections, *e. g., Kusper* v. *Pontikes,* 414 U. S. 51 (1973); and restrictions on candidate access to the ballot, *e. g., Illinois Elections Bd.* v. *Socialist Workers Party,* 440 U. S. 173 (1979).

To be sure, we have approved some limitations on the right to vote. Compare, *e. g., Salyer Land Co.* v. *Tulare Water District,* 410 U. S. 719 (1973), with *Kramer* v. *Union School District, supra.* We have never, however, required a showing of discriminatory purpose to support a claim of infringement of this fundamental interest. To the contrary, the Court

Indeed, our vote-dilution cases have explicitly acknowledged that they are premised on the infringement of a fundamental right, not on the Equal Protection Clause's prohibition of racial discrimination. Our first vote-dilution decision, *Fortson* v. *Dorsey, supra,* involved a 1962 Georgia reapportionment statute that allocated the 54 seats of the Georgia Senate among the State's 159 counties. Thirty-three of the senatorial districts were made up of from one to eight counties each, and were single-member districts. The remaining 21 districts were allotted among the 7 most populous counties, with each county containing at least 2 districts and electing all of its senators by countywide vote. The plaintiffs, who were registered voters residing in two of the multidistrict counties,[16] argued that the apportionment plan on its face violated the Equal Protection Clause because countywide voting in the seven multidistrict counties denied their residents a vote equal to that of voters residing in single-member con-

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has accepted at face value the purposes articulated for a qualification of this right, and has invalidated such a limitation under the Equal Protection Clause only if its purpose either lacked sufficient substantiality when compared to the individual interests affected or could have been achieved by less restrictive means. See, *e. g., Dunn* v. *Blumstein,* 405 U. S., at 335, 337, 343–360.

The approach adopted in this line of cases has been synthesized with the one person, one vote doctrine of *Reynolds* v. *Sims* in the following fashion: "It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population." *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S. 1, 59, n. 2 (1973) (STEWART, J., concurring) (citing *Reynolds* v. *Sims, supra; Kramer* v. *Union School District, supra; Dunn* v. *Blumstein, supra*). It is plain that this standard requires no showing of discriminatory purpose to trigger strict scrutiny of state interference with the right to vote.

[16] See *Dorsey* v. *Fortson,* 228 F. Supp. 259, 261 (ND Ga. 1964) (three-judge court), rev'd, 379 U. S. 433 (1965).

stituencies.[17] We were unconvinced that the plan operated to dilute any Georgian's vote, and therefore upheld the facial validity of the scheme. We cautioned, however, that the Equal Protection Clause would not tolerate a multimember districting plan that "designedly or otherwise, . . . operate[d] to minimize or cancel out the voting strength of racial or *political* elements of the voting population." 379 U. S., at 439 (emphasis added).

The approach to vote dilution adopted in *Fortson* plainly consisted of a fundamental-rights analysis. If the Court had believed that the equal protection problem with alleged vote dilution was one of racial discrimination and not abridgment of the right to vote, it would not have accorded standing to the plaintiffs, who were simply registered voters of Georgia alleging that the state apportionment plan, as a theoretical matter, diluted their voting strength because of where they lived. To the contrary, we did not question their standing, and held against them solely because we found unpersuasive their claim on the merits. The Court did not reach this result by inadvertence; rather, we explicitly recognized that we had adopted a fundamental-rights approach when we stated that the Equal Protection Clause protected the voting strength of political as well as racial groups.

Until today, this Court had never deviated from this principle. We reiterated that our vote-dilution doctrine protects political groups in addition to racial groups in *Burns* v. *Richardson,* 384 U. S., at 88, where we allowed a general class of qualified voters to assert such a vote-dilution claim. In *Whitcomb* v. *Chavis,* 403 U. S. 124 (1971), we again explicitly recognized that political groups could raise such claims, *id.,* at 143, 144. In *White* v. *Regester,* 412 U. S. 755 (1973), the plaintiffs were Negroes and Mexican-Americans, and accordingly the Court had no reason to discuss whether nonminority plaintiffs could assert claims of vote dilution.[18] In a companion case to *White,* however, we again recognized that "political elements" were protected against vote dilution. *Gaffney* v. *Cummings,* 412 U. S. 735, 751 (1973). Two years later, in *Dallas County* v. *Reese,* 421 U. S. 477 (1975) (*per curiam*), we accorded standing to urban dwellers alleging vote dilution as to the election of the county commission and stated that multimember districting is unconstitutional if it "in fact operates impermissibly to dilute the voting strength of an *identifiable element* of the voting population." *Id.,* at 480 (emphasis added). And in *United Jewish Organizations* v. *Carey,* 430 U. S. 144 (1977), the plurality opinion of MR. JUSTICE WHITE stated that districting plans were subject to attack if they diluted the vote of *"racial or political groups." Id.,* at 167 (emphasis in original).[19]

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[17] Specifically, the plaintiffs contended that countywide voting in the multidistrict counties could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters of one district. *Fortson* v. *Dorsey,* 379 U. S., at 436–437.

Our vote-dilution decisions, then, involve the fundamental-interest branch, rather than the antidiscrimination branch, of our jurisprudence under the Equal Protection Clause. They recognize a substantive constitutional right to participate on an equal basis in the electoral process that cannot be denied or diminished for any reason, racial or otherwise, lacking quite substantial justification. They are premised on a rationale wholly apart from that underlying *Washington* v. *Davis,* 426 U. S. 229 (1976). That decision involved application of a different equal protection principle, the prohibition on racial discrimination in the governmental distribution of interests to which citizens have no constitutional entitlement.[20] Whatever may be the merits of applying motivational analysis to the allocation of constitutionally gratuitous benefits, that approach is completely misplaced where, as here, it is applied to the distribution of a constitutionally protected interest.[21]

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[18] The same is true of our most recent case discussing vote dilution, *Wise* v. *Lipscomb,* 437 U. S. 535 (1978).

[19] In contrast to a racial group, however, a political group will bear a rather substantial burden of showing that it is sufficiently discrete to suffer vote dilution. See *Dallas County* v. *Reese,* 421 U. S. 477 (1975) (*per curiam*) (allowing city dwellers to attack a countywide multimember district). See generally Comment, Effective Representation and Multimember Districts, 68 Mich. L. Rev. 1577, 1594–1596 (1970).

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[20] The dispute in *Washington* v. *Davis* concerned alleged racial discrimination in public employment, an interest to which no one has a constitutional right, see n. 11, *supra*. In that decision, the Court held only that "the invidious quality of a law *claimed to be racially discriminatory* must ultimately be traced to a racially discriminatory purpose." 426 U. S., at 240 (emphasis added). The Court's decisions following *Washington* v. *Davis* have also involved alleged discrimination in the allocation of interests falling short of constitutional rights. *Personnel Administrator of Mass.* v. *Feeney,* 442 U. S. 256 (1979) (alleged sex discrimination in public employment); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977) (alleged racial discrimination in zoning). As explained in *Feeney, supra,* "[w]hen some other independent right is not at stake . . . and when there is no 'reason to infer antipathy,' . . . it is presumed that 'even improvident decisions will eventually be rectified by the democratic process.'" 442 U. S., at 272 (quoting *Vance* v. *Bradley,* 440 U. S. 93, 97 (1979)).

[21] Professor Ely has recognized this distinction:

"The danger I see is . . . that the Court, in its newfound enthusiasm for motivation analysis, will seek to export it to fields where it has no business. It therefore cannot be emphasized too strongly that analysis of motivation is appropriate only to claims of improper discrimination in the distribution of goods that are constitutionally gratuitous (that is, benefits to which people are not entitled as a matter of substantive constitutional right). . . . However, *where what is denied is something to which the complainant has a substantive constitutional right*—either because it is granted by the terms of the Constitution, or because it is essential to the effective functioning of a democratic government—*the reasons it was denied are irrelevant.* It may become important in court what justifications counsel for the state can *articulate* in support of its denial or nonprovision, but the reasons that actually inspired the denial never can: To have a right to something is to have a claim on it irrespective of why it is denied. It would be a tragedy of the first order were the Court to expand its burgeoning awareness of the relevance of motivation into the thoroughly mistaken notion that a denial of a constitutional right does not count as such unless it was intentional." Ely, The Centrality and Limits of Motivation Anal-

Washington v. *Davis,* then, in no way alters the discriminatory-impact test developed in *Fortson* v. *Dorsey,* 379 U. S. 433 (1965), and applied in *White* v. *Regester, supra,* to evaluate claims of dilution of the fundamental right to vote. In my view, that test is now, and always has been, the proper method of safeguarding against inequitable distribution of political influence.

The plurality's response is that my approach amounts to nothing less than a constitutional requirement of proportional representation for groups. See *ante,* at 75–80. That assertion amounts to nothing more than a red herring: I explicitly reject the notion that the Constitution contains any such requirement. See n. 7, *supra.* The constitutional protection against vote dilution found in our prior cases does not extend to those situations in which a group has merely failed to elect representatives in proportion to its share of the population. To prove unconstitutional vote dilution, the group is also required to carry the far more onerous burden of demonstrating that it has been effectively fenced out of the political process. See *ibid.* Typical of the plurality's mischaracterization of my position is its assertion that I would provide protection against vote dilution for "every 'political group,' or at least every such group that is in the minority." *Ante,* at 75. The vote-dilution doctrine can logically apply only to groups whose electoral discreteness and insularity allow dominant political factions to ignore them. See nn. 7 and 19, *supra.* In short, the distinction between a requirement of proportional representation and the discriminatory-effect test I espouse is by no means a difficult one, and it is hard for me to understand why the plurality insists on ignoring it.

The plaintiffs in No. 77–1844 proved that no Negro had ever been elected to the Mobile City Commission, despite the fact that Negroes constitute about one-third of the electorate, and that the persistence of severe racial bloc voting made it highly

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ysis, 15 San Diego L. Rev. 1155, 1160–1161 (1978) (emphasis in original) (footnotes omitted).

unlikely that any Negro could be elected at large in the foreseeable future. 423 F. Supp. 384, 387–389 (SD Ala. 1976). Contrary to the plurality's contention, see *ante*, at 75–76, however, I do not find unconstitutional vote dilution in this case simply because of that showing. The plaintiffs convinced the District Court that Mobile Negroes were unable to use alternative avenues of political influence. They showed that Mobile Negroes still suffered pervasive present effects of massive historical official and private discrimination, and that the City Commission had been quite unresponsive to the needs of the minority community. The City of Mobile has been guilty of such pervasive racial discrimination in hiring employees that extensive intervention by the Federal District Court has been required. 423 F. Supp., at 389, 400. Negroes are grossly underrepresented on city boards and committees. *Id.*, at 389–390. The city's distribution of public services is racially discriminatory. *Id.*, at 390–391. City officials and police were largely unmoved by Negro complaints about police brutality and a "mock lynching." *Id.*, at 392. The District Court concluded that "[t]his sluggish and timid response is another manifestation of the low priority given to the needs of the black citizens and of the [commissioners'] political fear of a white backlash vote when black citizens' needs are at stake." *Ibid.* See also the dissenting opinion of my Brother WHITE, *ante*, p. 94.

A requirement of proportional representation would indeed transform this Court into a "super-legislature," *ante*, at 76, and would create the risk that some groups would receive an undeserved windfall of political influence. In contrast, the protection against vote dilution recognized by our prior cases serves as a minimally intrusive guarantee of political survival for a discrete political minority that is effectively locked out of governmental decisionmaking processes.[22] So understood, the doctrine hardly "'create[s] substantive constitutional rights in the name of guaranteeing equal protection of the laws,'" *ibid.*, quoting *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S., at 33. Rather, the doctrine is a simple reflection of the basic principle that the Equal Protection Clause protects "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens." *Reynolds* v. *Sims,* 377 U. S., at 576.[23]

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[22] It is at this point that my view most diverges from the position expressed by my Brother STEVENS, *ante*, p. 83. He would strictly scrutinize

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state action having an adverse impact on an individual's right to vote. In contrast, he would apply a less stringent standard to state action diluting the political influence of a group. See *ante,* at 83–85. The facts of the present cases, however, demonstrate that severe and persistent racial bloc voting, when coupled with the inability of the minority effectively to participate in the political arena by alternative means, can effectively disable the individual Negro as well as the minority community as a whole. In these circumstances, MR. JUSTICE STEVENS' distinction between the rights of individuals and the political strength of groups becomes illusory.

[23] The foregoing disposes of any contention that, merely by citing *Wright* v. *Rockefeller,* 376 U. S. 52 (1964), the Court in *Washington* v. *Davis,* 426 U. S., at 240, and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S., at 264, intended to bring vote-dilution cases within the discriminatory-purpose requirement. *Wright* v. *Rockefeller, supra,* was a racial gerrymander case, and the plaintiffs had alleged only that they were the victims of an intentional scheme to draw districting lines discriminatorily. In focusing solely on whether the plaintiffs had proved intentional discrimination, the Court in *Wright* v. *Rockefeller* was merely limiting the scope of its inquiry to the issue raised by the plaintiffs. If *Wright* v. *Rockefeller* had been brought after this Court had decided our vote-dilution decisions, the plaintiffs perhaps would have recognized that, in addition to a claim of intentional racial gerrymandering, they could allege an equally sufficient cause of action under the Equal Protection Clause—that the districting lines had the effect of diluting their vote.

Wright v. *Rockefeller,* then, treated proof of discriminatory purpose as a sufficient condition to trigger strict scrutiny of a districting scheme, but had no occasion to consider whether such proof was necessary to invoke that standard. Its citations in *Washington* v. *Davis, supra,* and *Arlington*

II

Section 1 of the Fifteenth Amendment provides:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Today the plurality gives short shrift to the argument that proof of discriminatory intent is not a necessary condition to relief under this Amendment. See *ante,* at 61–65.[24] I have examined this issue in another context and reached the contrary result. *Beer* v. *United States,* 425 U. S. 130, 146–149, and nn. 3–5 (1976) (dissenting opinion). I continue to be-

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Heights, supra, were useful to show the relevancy, but not the necessity, of evidence of discriminatory intent. These citations are in no way inconsistent with my view that proof of discriminatory purpose is not a necessary condition to the invalidation of multimember districts that dilute the vote of racial or political elements.

In addition, any argument that, merely by citing *Wright* v. *Rockefeller,* the Court in *Washington* v. *Davis* and *Arlington Heights* intended to apply the discriminatory-intent requirement to vote-dilution claims is premised on two unpalatable assumptions. First, because the discussion of *Wright* v. *Rockefeller* was unnecessary to the resolution of the issues in both of those decisions, the argument assumes that the Court in both cases decided important issues in brief dicta. Second, the argument assumes that the Court twice intended covertly to overrule the discriminatory-effects test applied in *White* v. *Regester,* 412 U. S. 755 (1973), without even citing *White.* Neither assumption is tenable.

[24] It is important to recognize that only the four Members of the plurality are committed to this view. In addition to my Brother BRENNAN and myself, my Brother STEVENS expressly states that proof of discriminatory effect can be a sufficient condition to support the invalidation of districting, see *ante,* at 90. My Brother WHITE finds the proof of discriminatory purpose in these cases sufficient to support the decisions of the Courts of Appeals, and accordingly he does not reach the issue whether proof of discriminatory impact, standing alone, would suffice under the Fifteenth Amendment. My Brother BLACKMUN also expresses no view on this issue, since he too finds the proof of discriminatory intent sufficient to support the findings of violations of the Constitution.

lieve that "a showing of purpose or of effect is alone sufficient to demonstrate unconstitutionality," *id.*, at 149, n. 5, and wish to explicate further why I find this standard appropriate for Fifteenth Amendment claims. First, however, it is necessary to address the plurality's apparent suggestion that the Fifteenth Amendment protects against only denial, and not dilution, of the vote.[25]

A

The Fifteenth Amendment does not confer an absolute right to vote. See *ante*, at 62. By providing that the right to vote cannot be discriminatorily "denied *or* abridged," however, the Amendment assuredly strikes down the diminution as well as the outright denial of the exercise of the franchise. An interpretation holding that the Amendment reaches only complete abrogation of the vote would render the Amendment essentially useless, since it is no difficult task to imagine schemes in which the Negro's marking of the ballot is a meaningless exercise.

The Court has long understood that the right to vote encompasses protection against vote dilution. "[T]he right to have one's vote counted" is of the same importance as "the right to put a ballot in a box." *United States* v. *Mosley*, 238 U. S. 383, 386 (1915). See *United States* v. *Classic*, 313 U. S. 299 (1941); *Swafford* v. *Templeton*, 185 U. S. 487 (1902); *Wiley* v. *Sinkler*, 179 U. S. 58 (1900); *Ex parte Yarbrough*, 110 U. S. 651 (1884). The right to vote is protected against the diluting effect of ballot-box stuffing. *United States* v. *Saylor*, 322 U. S. 385 (1944); *Ex parte Siebold*, 100 U. S. 371 (1880). Indeed, this Court has explicitly recognized that the Fifteenth Amendment protects against vote dilution. In *Terry* v. *Adams*, 345 U. S. 461 (1953), and *Smith* v. *Allwright*, 321 U. S.

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[25] The plurality states that "[h]aving found that Negroes in Mobile 'register and vote without hindrance,' the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case." *Ante*, at 65.

649 (1944), the Negro plaintiffs did not question their access to the ballot for general elections. Instead they argued, and the Court recognized, that the value of their votes had been diluted by their exclusion from participation in primary elections and in the slating of candidates by political parties. The Court's struggles with the concept of "state action" in those decisions were necessarily premised on the understanding that vote dilution was a claim cognizable under the Fifteenth Amendment.

Wright v. *Rockefeller,* 376 U. S. 52 (1964), recognized that an allegation of vote dilution resulting from the drawing of district lines stated a claim under the Fifteenth Amendment. The plaintiffs in that case argued that congressional districting in New York violated the Fifteenth Amendment because district lines had been drawn in a racially discriminatory fashion. Each plaintiff had access to the ballot; their complaint was that because of intentional discrimination they resided in a district with population characteristics that had the effect of diluting the weight of their votes. The Court treated this claim as cognizable under the Fifteenth Amendment. More recently, in *United Jewish Organizations* v. *Carey,* 430 U. S. 144 (1977), we again treated an allegation of vote dilution arising from a redistricting scheme as stating a claim under the Fifteenth Amendment. See *id.,* at 155, 161–162, 165–168 (opinion of WHITE, J.). Indeed, in that case MR. JUSTICE STEWART found no Fifteenth Amendment violation in part because the plaintiffs had failed to prove "that the redistricting scheme was employed . . . to minimize or cancel out the voting strength of a minority class or interest; or otherwise to impair or burden the opportunity of affected persons to participate in the political process." *Id.,* at 179 (STEWART, J., joined by POWELL, J., concurring in judgment) (citing, *e. g., White* v. *Regester,* 412 U. S. 755 (1973); *Fortson* v. *Dorsey,* 379 U. S. 433 (1965); *Wright* v. *Rockefeller, supra*). See also *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960).

It is plain, then, that the Fifteenth Amendment shares the concept of vote dilution developed in such Fourteenth Amendment decisions as *Reynolds* v. *Sims,* 377 U. S. 533 (1964), and *Fortson* v. *Dorsey, supra.* In fact, under the Court's unified view of the protections of the right to vote accorded by disparate portions of the Constitution, the concept of vote dilution is a core principle of the Seventeenth and Nineteenth Amendments as well as the Fourteenth and Fifteenth:

> "The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women. If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. See *Terry* v. *Adams,* 345 U. S. 461. . . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.
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> . . . . .
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> "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Gray* v. *Sanders,* 372 U. S., at 379, 381.

The plurality's suggestion that the Fifteenth Amendment reaches only outright denial of the ballot is wholly inconsistent not only with our prior decisions, but also with the gloss the plurality would place upon the Fourteenth Amendment's protection against vote dilution. As I explained in Part I, *supra,* I strongly disagree with the plurality's conclusion that our

Fourteenth Amendment vote-dilution decisions have been based upon the Equal Protection Clause's prohibition of racial discrimination. Be that as it may, the plurality at least does not dispute that the Fourteenth Amendment's language—that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"—protects against dilution, as well as outright denial, of the right to vote on racial grounds, even though the Amendment does not mention any right to vote and speaks only of the denial, and not the diminution, of rights. Yet, when the plurality construes the language of the Fifteenth Amendment—which explicitly acknowledges the right to vote and prohibits its denial *or* abridgement on account of race—it seemingly would accord protection against only the absolute abrogation of the ballot. An interpretation of the Fifteenth Amendment limiting its prohibitions to the outright denial of the ballot would convert the words of the Amendment into language illusory in symbol and hollow in substance. Surely today's decision should not be read as endorsing that interpretation.[26]

B

The plurality concludes that our prior decisions establish the principle that proof of discriminatory intent is a necessary element of a Fifteenth Amendment claim.[27] In contrast, I continue to adhere to my conclusion in *Beer* v. *United States*, 425 U. S., at 148, n. 4 (dissenting opinion), that "[t]he Court's decisions relating to the relevance of purpose-and/or-effect analysis in testing the constitutionality of legislative enactments are somewhat less than a seamless web." As I there explained, at various times the Court's decisions have seemed to adopt three inconsistent approaches: (1) that purpose alone is the test for unconstitutionality; (2) that effect alone is the test; and (3) that purpose or effect, either alone or in combination, is sufficient to show unconstitutionality. *Ibid.* In my view, our Fifteenth Amendment jurisprudence on the necessity of proof of discriminatory purpose is no less unsettled than was our approach to the importance of such proof in Fourteenth Amendment racial discrimination cases prior to *Washington* v. *Davis*, 426 U. S. 229 (1976). What is called for in the present cases is a fresh consideration—similar to our inquiry in *Washington* v. *Davis, supra,* with regard to Fourteenth Amendment discrimination claims—of whether proof of discriminatory purpose is necessary to establish a claim under the Fifteenth Amendment. I will first justify my conclusion that our Fifteenth Amendment precedents do not control the outcome of this issue, and then turn to an examination of how the question should be resolved.

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[26] Indeed, five Members of the Court decline the opportunity to ascribe to this view. In addition to my Brother BRENNAN and myself, my Brother STEVENS expressly states that the Fifteenth Amendment protects against diminution as well as denial of the ballot, see *ante*, at 84, and n. 3. The dissenting opinion of my Brother WHITE and the separate opinion of my Brother BLACKMUN indicate that they share this view.

[27] The plurality does not attempt to support this proposition by relying on the history surrounding the adoption of the Fifteenth Amendment. I agree that we should resolve the issue of the relevancy of proof of discriminatory purpose and effect by examining our prior decisions and by considering the appropriateness of alternative standards in light of contemporary circumstances. That was, of course, the approach used in *Washington* v. *Davis*, 426 U. S. 229 (1976), to evaluate that issue with regard to Fourteenth Amendment racial discrimination claims.

1

The plurality cites *Guinn* v. *United States,* 238 U. S. 347 (1915); *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960); *Wright* v. *Rockefeller,* 376 U. S. 52 (1964); *Lassiter* v. *Northampton Election Bd.,* 360 U. S. 45 (1959); and *Lane* v. *Wilson,* 307 U. S. 268 (1939), as holding that proof of discriminatory purpose is necessary to support a Fifteenth Amendment claim. To me, these decisions indicate confusion, not resolution of this issue. As the plurality suggests, *ante,* at 62, the Court in *Guinn* v. *United States, supra,* did examine the purpose of a "grandfather clause" in the course of invalidating it. Yet 24 years later, in *Lane* v. *Wilson, supra,* at 277, the Court struck down a more sophisticated exclusionary scheme because it "operated unfairly" against Negroes. In accord with the prevailing doctrine of the time, see *Arizona* v. *California,* 283 U. S. 423, 455, and n. 7 (1931), the Court in *Lane* seemingly did not question the motives of public officials.

In upholding the use of a literacy test for voters in *Lassiter* v. *Northampton Election Bd., supra,* the Court apparently concluded that the plaintiff had failed to prove either discriminatory purpose or effect. *Gomillion* v. *Lightfoot, supra,* can be read as turning on proof of discriminatory motive, but the Court also stressed that the challenged redrawing of municipal boundaries had the "essential inevitable effect" of removing Negro voters from the city, 364 U. S., at 341, and that "the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights," *id.,* at 347. Finally, in *Wright* v. *Rockefeller, supra,* the plaintiffs alleged only purposeful discriminatory redistricting, and therefore the Court had no reason to consider whether proof of discriminatory effect would satisfy the Fifteenth Amendment.[28]

The plurality ignores cases suggesting that discriminatory purpose is not necessary to support a Fifteenth Amendment claim. In *Terry* v. *Adams,* 345 U. S. 461 (1953), a case in which no majority opinion was issued, three Justices approvingly discussed two decisions of the United States Court of Appeals for the Fourth Circuit[29] holding "that no election machinery could be sustained if its purpose *or* effect was to deny Negroes on account of their race an effective voice in the governmental affairs of their country, state, or community." *Id.,* at 466 (opinion of Black, J., joined by Douglas and Burton, JJ.) (emphasis added). More recently, in rejecting a First Amendment challenge to a federal statute providing criminal penalties for knowing destruction of a Selective Service registration certificate, the Court in *United States* v. *O'Brien,* 391 U. S. 367, 383 (1968), stated that "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." The Court in *O'Brien, supra,* at 385, interpreted *Gomillion* v. *Lightfoot, supra,* as turning on the discriminatory effect, and not the alleged discriminatory purpose, of the challenged redrawing of municipal boundaries. Three years later, in *Palmer* v. *Thompson,* 403 U. S. 217, 224–225 (1971), the Court relied on *O'Brien* to support its refusal to inquire whether a city had closed its swimming pools to avoid racial integration. As in *O'Brien,* the Court in *Palmer, supra,* at 225, interpreted *Gomillion* v. *Lightfoot* as focusing "on the actual effect" of the municipal boundary change, and not upon what motivated the city to redraw its borders. See also *Wright* v. *Council of City of Emporia,* 407 U. S. 451, 461–462 (1972).

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[28] See n. 23, *supra.*

[29] *Rice* v. *Elmore,* 165 F. 2d 387 (1947), cert. denied, 333 U. S. 875 (1948), and *Baskin* v. *Brown,* 174 F. 2d 391 (1949).

In holding that racial discrimination claims under the Equal Protection Clause must be supported by proof of discriminatory intent, the Court in *Washington* v. *Davis, supra,* signaled some movement away from the doctrine that such proof is irrelevant to constitutional adjudication. Although the Court, 426 U. S., at 242–244, and n. 11, attempted mightily to distinguish *Palmer* v. *Thompson, supra,* its decision was in fact based upon a judgment that, in light of modern circumstances, the Equal Protection Clause's ban on racial discrimination in the distribution of constitutional gratuities should be interpreted as prohibiting only intentional official discrimination.[30]

These vacillations in our approach to the relevance of discriminatory purpose belie the plurality's determination that our prior decisions require such proof to support Fifteenth Amendment claims. To the contrary, the Court today is in the same unsettled position with regard to the Fifteenth Amendment as it was four years ago in *Washington* v. *Davis*, *supra*, regarding the Fourteenth Amendment's prohibition on racial discrimination. The absence of old answers mandates a new inquiry.

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[30] See nn. 20, 21, *supra,* and accompanying text.

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The Court in *Washington* v. *Davis* required a showing of discriminatory purpose to support racial discrimination claims largely because it feared that a standard based solely on disproportionate impact would unduly interfere with the far-ranging governmental distribution of constitutional gratuities.[31] Underlying the Court's decision was a determination that, since the Constitution does not entitle any person to such governmental benefits, courts should accord discretion to those officials who decide how the government shall allocate its scarce resources. If the plaintiff proved only that governmental distribution of constitutional gratuities had a disproportionate effect on a racial minority, the Court was willing to presume that the officials who approved the allocation scheme either had made an honest error or had foreseen that the decision would have a discriminatory impact and had found persuasive, legitimate reasons for imposing it nonetheless. These assumptions about the good faith of officials allowed the Court to conclude that, standing alone, a showing that a governmental policy had a racially discriminatory impact did not indicate that the affected minority had suffered the stigma, frustration, and unjust treatment prohibited under the suspect-classification branch of our equal protection jurisprudence.

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[31] The Court stated:

"A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." 426 U. S., at 248.

See n. 20, *supra*.

Such judicial deference to official decisionmaking has no place under the Fifteenth Amendment. Section 1 of that Amendment differs from the Fourteenth Amendment's prohibition on racial discrimination in two crucial respects: it explicitly recognizes the right to vote free of hindrances related to race, and it sweeps no further. In my view, these distinctions justify the conclusion that proof of racially discriminatory impact should be sufficient to support a claim under the Fifteenth Amendment. The right to vote is of such fundamental importance in the constitutional scheme that the Fifteenth Amendment's command that it shall not be "abridged" on account of race must be interpreted as providing that the votes of citizens of all races shall be of substantially equal weight. Furthermore, a disproportionate-impact test under the Fifteenth Amendment would not lead to constant judicial intrusion into the process of official decisionmaking. Rather, the standard would reach only those decisions having a discriminatory effect upon the minority's vote. The Fifteenth Amendment cannot tolerate that kind of decision, even if made in good faith, because the Amendment grants racial minorities the full enjoyment of the right to vote, not simply protection against the unfairness of intentional vote dilution along racial lines.[32]

In addition, it is beyond dispute that a standard based solely upon the motives of official decisionmakers creates significant problems of proof for plaintiffs and forces the inquiring court to undertake an unguided, tortuous look into the minds of officials in the hope of guessing why certain policies were adopted and others rejected. See *Palmer* v. *Thomp-*

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[32] Even if a municipal policy is shown to dilute the right to vote, however, the policy will not be struck down if the city shows that it serves highly important local interests and is closely tailored to effectuate only those interests. See *Dunn* v. *Blumstein,* 405 U. S. 330 (1972). Cf. *Abate* v. *Mundt,* 403 U. S. 182 (1971).

son, 403 U. S., at 224–225; *United States* v. *O'Brien,* 391 U. S., at 382–386; cf. *Keyes* v. *School District No. 1, Denver, Colo.,* 413 U. S. 189, 224, 227 (1973) (POWELL, J., concurring in part and dissenting in part). An approach based on motivation creates the risk that officials will be able to adopt policies that are the products of discriminatory intent so long as they sufficiently mask their motives through the use of subtlety and illusion. *Washington* v. *Davis* is premised on the notion that this risk is insufficient to overcome the deference the judiciary must accord to governmental decisions about the distribution of constitutional gratuities. That risk becomes intolerable, however, when the precious right to vote protected by the Fifteenth Amendment is concerned.

I continue to believe, then, that under the Fifteenth Amendment an "[e]valuation of the purpose of a legislative enactment is just too ambiguous a task to be the sole tool of constitutional analysis. . . . [A] demonstration of effect ordinarily should suffice. If, of course, purpose may conclusively be shown, it too should be sufficient to demonstrate a statute's unconstitutionality." *Beer* v. *United States,* 425 U. S., at 149–150, n. 5 (MARSHALL, J., dissenting). The plurality's refusal in this case even to consider this approach bespeaks an indifference to the plight of minorities who, through no fault of their own, have suffered diminution of the right preservative of all other rights.[33]

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[33] In my view, the standard of *White* v. *Regester,* 412 U. S. 755 (1973), see n. 7, *supra,* and accompanying text, is the proper test under both the Fourteenth and Fifteenth Amendments for determining whether a districting scheme has the unconstitutional effect of diluting the Negro vote. It is plain that the District Court in both of the cases before us made the "intensely local appraisal" necessary under *White, supra,* at 769, and correctly decided that the at-large electoral schemes for the Mobile City Commission and County School Board violated the *White* standard. As I earlier note with respect to No. 77–1844, see *supra,* at 122–123, the District Court determined: (1) that Mobile Negroes still suffered pervasive present effects of massive historical official and private discrimination; (2) that the City Commission and County School Board had been quite

III

If it is assumed that proof of discriminatory intent is necessary to support the vote-dilution claims in these cases, the question becomes what evidence will satisfy this requirement.[34] The plurality assumes, without any analysis, that these cases are appropriate for the application of the rigid test developed in *Personnel Administrator of Mass.* v. *Feeney,* 442 U. S., at 279, requiring that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." In my view, the *Feeney* standard creates a burden of proof far too extreme to apply in vote-dilution cases.[35]

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unresponsive to the needs of the minority community; (3) that no Negro had ever been elected to either body, despite the fact that Negroes constitute about one-third of the electorate; (4) that the persistence of severe racial bloc voting made it highly unlikely that any Negro could be elected at large to either body in the foreseeable future; and (5) that no state policy favored at-large elections, and the local preference for that scheme was outweighed by the fact that the unconstitutional vote dilution could be corrected only by the imposition of single-member districts. *Bolden* v. *City of Mobile,* 423 F. Supp. 384 (SD Ala. 1976); *Brown* v. *Moore,* 428 F. Supp. 1123 (SD Ala. 1976). The Court of Appeals affirmed these findings in all respects. *Bolden* v. *City of Mobile,* 571 F. 2d 238 (CA5 1978); *Brown* v. *Moore,* 575 F. 2d 298 (CA5 1978). See also the dissenting opinion of my Brother WHITE, *ante,* p. 94.

[34] The statutes providing for at-large election of the members of the two governmental bodies involved in these cases, see n. 33, *supra,* have been in effect since the days when Mobile Negroes were totally disenfranchised by the Alabama Constitution of 1901. The District Court in both cases found, therefore, that the at-large schemes could not have been adopted for discriminatory purposes. *Bolden* v. *City of Mobile,* 423 F. Supp., at 386, 397; *Brown* v. *Moore,* 428 F. Supp., at 1126–1127, 1138. The issue is, then, whether officials have maintained these electoral systems for discriminatory purposes. Cf. *Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U. S., at 257–258, 267–271, and n. 17.

[35] As the dissenting opinion of my Brother WHITE demonstrates, however, the facts of these cases compel a finding of unconstitutional vote dilution even under the plurality's standard.

This Court has acknowledged that the evidentiary inquiry involving discriminatory intent must necessarily vary depending upon the factual context. See *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S., at 264–268; *Washington* v. *Davis,* 426 U. S., at 253 (STEVENS, J., concurring). One useful evidentiary tool, long recognized by the common law, is the presumption that "[e]very man must be taken to contemplate the probable consequences of the act he does." *Townsend* v. *Wathen,* 9 East. 277, 280, 103 Eng. Rep. 579, 580–581 (K. B. 1808). The Court in *Feeney, supra,* at 279, n. 25, acknowledged that proof of foreseeability of discriminatory consequences could raise a "strong inference that the adverse effects were desired," but refused to treat this presumption as conclusive in cases alleging discriminatory distribution of constitutional gratuities.

I would apply the common-law foreseeability presumption to the present cases. The plaintiffs surely proved that maintenance of the challenged multimember districting would have the foreseeable effect of perpetuating the submerged electoral influence of Negroes, and that this discriminatory effect could be corrected by implementation of a single-member districting plan.[36] Because the foreseeable disproportionate impact was so severe, the burden of proof should have shifted to the defendants, and they should have been required to show that they refused to modify the districting schemes in spite of, not because of, their severe discriminatory effect. See *Feeney, supra,* at 284 (MARSHALL, J., dissenting). Reallocation of the burden of proof is especially appropriate in these cases, where the challenged state action infringes the exercise of a fundamental right. The defendants would carry their burden of proof only if they showed that they considered submergence of the Negro vote a detriment, not a benefit, of the multimember systems, that they accorded minority citizens the same respect given to whites, and that they nevertheless decided to maintain the systems for legitimate reasons. Cf. *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U. S. 274, 287 (1977); *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra,* at 270–271, n. 21.

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[36] Indeed, the District Court in the present cases concluded that the evidence supported the plaintiffs' position that unconstitutional vote dilution was the natural and foreseeable consequence of the maintenance of the challenged multimember districting. *Brown* v. *Moore,* 428 F. Supp., at 1138; *Bolden* v. *City of Mobile,* 423 F. Supp., at 397–398.

This approach recognizes that

> "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation." *Washington* v. *Davis, supra,* at 253 (STEVENS, J., concurring).

Furthermore,. if proof of discriminatory purpose is to be required in these cases, this standard would comport with my view that the degree to which the government must justify a decision depends upon the importance of the interests infringed by it. See *San Antonio Independent School Dist.* v. *Rodriguez,* 411 U. S., at 109–110 (MARSHALL, J., dissenting).[37]

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[37] MR. JUSTICE STEVENS acknowledges that both discriminatory intent and discriminatory effect are present in No. 77–1844. See *ante,* at 92–94. Nonetheless, he finds no constitutional violation, apparently because he believes that the electoral structure of Mobile conforms to a commonly used scheme, the discriminatory impact is in his view not extraordinary, and the structure is supported by sufficient noninvidious justifications so that it is neither wholly irrational nor entirely motivated by discriminatory animus. To him, racially motivated decisions in this setting are an inherent part of the political process and do not involve invidious discrimination.

The facts of the present cases, however, indicate that in Mobile considerations of race are far more powerful and pernicious than are considerations of other divisive aspects of the electorate. See *supra,* at 122–123. In Mobile, as elsewhere, "the experience of Negroes . . . has been different

The plurality also fails to recognize that the maintenance of multimember districts in the face of foreseeable discriminatory consequences strongly suggests that officials are blinded by "racially selective sympathy and indifference." [38] Like outright racial hostility, selective racial indifference reflects a belief that the concerns of the minority are not worthy of the same degree of attention paid to problems perceived by whites. When an interest as fundamental as voting is diminished along racial lines, a requirement that discriminatory purpose must be proved should be satisfied by a showing that official action was produced by this type of pervasive bias. In the present cases, the plaintiffs presented strong evidence of such bias: they showed that Mobile officials historically discriminated against Negroes, that there are pervasive present effects of this past discrimination, and that officials have not been responsive to the needs of the minority community. It takes only the smallest of inferential leaps to conclude that the decisions to maintain multimember districting having obvious discriminatory effects represent, at the very least, selective racial sympathy and indifference resulting in the frustration of minority desires, the stigmatization of the minority as second-class citizens, and the perpetuation of inhumanity.[39]

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in kind, not just in degree, from that of other ethnic groups." *University of California Regents* v. *Bakke,* 438 U. S. 265, 400 (1978) (opinion of MARSHALL, J.). An approach that accepts intentional discrimination against Negroes as merely an aspect of politics as usual strikes at the very hearts of the Fourteenth and Fifteenth Amendments.

[38] Brest, The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 7 (1976). See also Note, Racial Vote Dilution in Multimember Districts: The Constitutional Standard After *Washington* v. *Davis,* 76 Mich. L. Rev. 694, 716–719 (1978).

[39] The plurality, *ante,* at 74–75, n. 21, indicates that on remand the lower courts are to examine the evidence in these cases under the discriminatory-intent standard of *Personnel Administrator of Mass.* v. *Feeney,* 442 U. S. 256 (1979), and may conclude that this test is met by proof of the refusal of Mobile's state-legislative delegation to stimulate the passage

IV

The American approach to government is premised on the theory that, when citizens have the unfettered right to vote,

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of legislation changing Mobile's city government into a mayor-council system in which council members are elected from single-member districts. The plurality concludes, then, only that the District Court and the Court of Appeals in each of the present cases evaluated the evidence under an improper legal standard, and not that the evidence fails to support a claim under *Feeney, supra.* When the lower courts examine these cases under the *Feeney* standard, they should, of course, recognize the relevancy of the plaintiffs' evidence that vote dilution was a foreseeable and natural consequence of the maintenance of the challenged multimember districting, and that officials have apparently exhibited selective racial sympathy and indifference. Cf. *Dayton Board of Education* v. *Brinkman,* 443 U. S. 526 (1979); *Columbus Board of Education* v. *Penick,* 443 U. S. 449 (1979).

Finally, it is important not to confuse the differing views the plurality and I have on the elements of proving unconstitutional vote dilution. The plurality concludes that proof of intentional discrimination, as defined in *Feeney, supra,* is necessary to support such a claim. The plurality finds this requirement consistent with the statement in *White* v. *Regester,* 412 U. S., at 766, that unconstitutional vote dilution does not occur simply because a minority has not been able to elect representatives in proportion to its voting potential. The extra necessary element, according to the plurality, is a showing of discriminatory intent. In the plurality's view, the evidence presented in *White* going beyond mere proof of underrepresentation of the minority properly supported an inference that the multimember districting scheme in question was tainted with a discriminatory purpose.

The plurality's approach should be satisfied, then, by proof that an electoral scheme enacted with a discriminatory purpose effected a retrogression in the minority's voting power. Cf. *Beer* v. *United States,* 425 U. S. 130, 141 (1976). The standard should also be satisfied by proof that a scheme maintained for a discriminatory purpose has the effect of submerging minority electoral influence below the level it would have under a reasonable alternative scheme.

The plurality does not address the question whether proof of discriminatory effect is necessary to support a vote-dilution claim. It is clear from the above, however, that if the Court at some point creates such a requirement, it would be satisfied by proof of mere disproportionate impact. Such a requirement would be far less stringent than the burden of proof republic officials will make decisions by the democratic accommodation of competing beliefs, not by deference to the mandates of the powerful. The American approach to civil rights is premised on the complementary theory that the unfettered right to vote is preservative of all other rights. The theoretical foundations for these approaches are shattered where, as in the present cases, the right to vote is granted in form, but denied in substance.

It is time to realize that manipulating doctrines and drawing improper distinctions under the Fourteenth and Fifteenth Amendments, as well as under Congress' remedial legislation enforcing those Amendments, make this Court an accessory to the perpetuation of racial discrimination. The plurality's requirement of proof of *intentional discrimination,* so inappropriate in today's cases, may represent an attempt to bury the legitimate concerns of the minority beneath the soil of a doctrine almost as impermeable as it is specious. If so, the superficial tranquility created by such measures can be but short-lived. If this Court refuses to honor our long-recognized principle that the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination," *Lane* v. *Wilson,* 307 U. S., at 275, it cannot expect the victims of discrimination to respect political channels of seeking redress. I dissent.

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quired under the rather rigid discriminatory-effects test I find in *White* v. *Regester, supra.* See n. 7, *supra,* and accompanying text.

WHITE, SECRETARY OF STATE OF TEXAS, ET AL. *v.* REGESTER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 72-147. Argued February 26, 1973—Decided June 18, 1973

In this litigation challenging the Texas 1970 legislative reapportionment scheme, a three-judge District Court held that the House plan, statewide, contained constitutionally impermissible deviations from population equality, and that the multimember districts provided for Bexar and Dallas Counties invidiously discriminated against cognizable racial or ethnic groups. Though the entire plan was declared invalid, the court permitted its use for the 1972 election except for its injunction order requiring those two county multimember districts to be reconstituted into single-member districts. *Held:*

1. This Court has jurisdiction under 28 U. S. C. § 1253 to consider the appeal from the injunction order applicable to the Bexar County and Dallas County districting, since the three-judge court had been properly convened, and this Court can review the declaratory part of the judgment below. *Roe* v. *Wade,* 410 U. S. 113. Pp. 759-761.

2. State reapportionment statutes are not subject to the stricter standards applicable to congressional reapportionment under Art. I, § 2, and the District Court erred in concluding that this case, where the total maximum variation between House districts was 9.9%, but the average deviation from the ideal was 1.82%, involved invidious discrimination in violation of the Equal Protection Clause. Cf. *Gaffney* v. *Cummings, ante,* p. 735. Pp. 761-764.

3. The District Court's order requiring disestablishment of the multimember districts in Dallas and Bexar Counties was warranted in the light of the history of political discrimination against Negroes and Mexican-Americans residing, respectively, in those counties and the residual effects of such discrimination upon those groups. Pp. 765-770.

343 F. Supp. 704, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in Parts I, III, and IV of which all Members joined, and in Part II of which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 772.

Leon Jaworski, Special Assistant Attorney General of Texas, argued the cause for appellants. With him on the briefs were *John L. Hill*, Attorney General, *Larry York*, Executive Assistant Attorney General, *Alton F. Curry*, Special Assistant Attorney General, and *Lewis A. Jones*, Assistant Attorney General.

David R. Richards argued the cause for appellees Regester et al. With him on the brief were *Ronald L. Clower* and *James A. Mattox*. *Ed Idar, Jr.*, argued the cause for appellees Bernal et al. With him on the brief were *Mario Obledo, George J. Korbel,* and *Frank Hernandez*. *Thomas Gibbs Gee* argued the cause for appellees Willeford et al. With him on the brief was *William Terry Bray*. *J. Douglas McGuire* filed a brief for appellees Van Henry Archer, Jr., et al. *D. Marcus Ranger* and *E. Brice Cunningham* filed a brief for appellees Washington et al.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case raises two questions concerning the validity of the reapportionment plan for the Texas House of Representatives adopted in 1970 by the State Legislative Redistricting Board: First, whether there were unconstitutionally large variations in population among the districts defined by the plan; second, whether the multimember districts provided for Bexar and Dallas Counties were properly found to have been invidiously discriminatory against cognizable racial or ethnic groups in those counties.

**William A. Dobrovir* filed a brief for League of Women Voters of the United States et al. as *amici curiae* urging affirmance.

The Texas Constitution requires the state legislature to reapportion the House and Senate at its first regular session following the decennial census. Tex. Const., Art. III, § 28.[1] In 1970, the legislature proceeded to reapportion the House of Representatives but failed to agree on a redistricting plan for the Senate. Litigation was immediately commenced in state court challenging the constitutionality of the House reapportionment. The Texas Supreme Court held that the legislature's plan for the House violated the Texas Constitution.[2] *Smith* v. *Craddick,* 471 S. W. 2d 375 (1971). Meanwhile, pursuant to the requirements of the Texas Constitution, a Legislative Redistricting Board had been formed to begin the task of redistricting the Texas Senate. Although the Board initially confined its work to the reapportionment of the Senate, it was eventually ordered, in light of the judicial invalidation of the House plan, to also reapportion the House. *Mauzy* v. *Legislative Redistricting Board,* 471 S. W. 2d 570 (1971).

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[1] Article III, § 28, of the Texas Constitution provides:

"The Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts, agreeable to the provisions of Sections 25, 26, and 26-a of this Article. In the event the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such apportionment, same shall be done by the Legislature Redistricting Board of Texas, which is hereby created, and shall be composed of five (5) members, as follows: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office, a majority of whom shall constitute a quorum. Said Board shall assemble in the City of Austin within ninety (90) days after the final adjournment of such regular session. The Board shall, within sixty (60) days after assembling, apportion the state into senatorial and representative districts, or into senatorial or representative districts, as the failure of action of such Legislature may make necessary. Such apportionment shall be in writing and signed by three (3) or more of the members of the Board duly acknowledged as the act and deed of such Board, and, when so executed and filed with the Secretary of State, shall have force and effect of law. Such apportionment shall become effective at the next succeeding statewide general election. The Supreme Court of Texas shall have jurisdiction to compel such Commission [Board] to perform its duties in accordance with the provisions of this section by writ of mandamus or other extraordinary writs conformable to the usages of law. The Legislature shall provide necessary funds for clerical and technical aid and for other expenses incidental to the work of the Board, and the Lieutenant Governor and the Speaker of the House of Representatives shall be entitled to receive per diem and travel expense during the Board's session in the same manner and amount as they would receive while attending a special session of the Legislature. This amendment shall become effective January 1, 1951. As amended Nov. 2. 1948."

On October 15, 1971, the Redistricting Board's plan for the reapportionment of the Senate was released, and, on October 22, 1971, the House plan was promulgated. Only the House plan remains at issue in this case. That plan divided the 150-member body among 79 single-member and 11 multimember districts. Four lawsuits, eventually consolidated, were filed challenging the

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[2] The Court held that the plan violated Art. III, § 26, of the Texas Constitution, which provides:

"The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties."

Board's Senate and House plans and asserting with respect to the House plan that it contained impermissible deviations from population equality and that its multimember districts for Bexar County and Dallas County operated to dilute the voting strength of racial and ethnic minorities.

A three-judge District Court sustained the Senate plan, but found the House plan unconstitutional. *Graves* v. *Barnes,* 343 F. Supp. 704 (WD Tex. 1972). The House plan was held to contain constitutionally impermissible deviations from population equality, and the multimember districts in Bexar and Dallas Counties were deemed constitutionally invalid. The District Court gave the Texas Legislature until July 1, 1973, to reapportion the House, but the District Court permitted the Board's plan to be used for purposes of the 1972 election, except for requiring that the Dallas County and Bexar County multimember districts be reconstituted into single-member districts for the 1972 election.

Appellants appealed the statewide invalidation of the House plan and the substitution of single-member for multimember districts in Dallas County and Bexar County.[3] MR. JUSTICE POWELL denied a stay of the judgment of the District Court, 405 U. S. 1201, and we noted probable jurisdiction *sub nom. Bullock* v. *Regester,* 409 U. S. 840.

I

We deal at the outset with the challenge to our jurisdiction over this appeal under 28 U. S. C. § 1253, which permits injunctions in suits required to be heard and determined by a three-judge district court to be appealed directly to this Court.[4] It is first suggested that the case was not one required to be heard by a three-judge court. The contention is frivolous. A statewide reapportionment statute was challenged and injunctions were asked against its enforcement. The constitutional questions raised were not insubstantial on their face, and the complaint clearly called for the convening of a three-judge court. That the court declared the entire apportionment plan invalid, but entered an injunction only with respect to its implementation for the 1972 elections in Dallas and Bexar Counties, in no way indicates that the case required only a single judge. Appellants are therefore properly here on direct appeal with respect to the injunction dealing with Bexar and Dallas Counties, for the order of the court directed at those counties was literally an order "granting . . . an . . . injunction in any civil action . . . required . . . to be heard and determined by a district court of three judges" within the meaning of § 1253.

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[3] In a separate appeal, we summarily affirmed that portion of the judgment of the District Court upholding the Senate plan. *Archer* v. *Smith,* 409 U. S. 808 (1972).

We also hold that appellants, because they appealed from the entry of an injunction, are entitled to review of the District Court's accompanying declaration that the proposed plan for the Texas House of Representatives, including those portions providing for multimember districts in Dallas and Bexar Counties, was invalid statewide. This declaration was the predicate for the court's order requiring Dallas and Bexar Counties to be reapportioned into single districts; for its order that "unless the Legislature of the State of Texas on or before July 1, 1973, has adopted a plan to reapportion the legislative districts within the State in accordance with the constitutional guidelines set out in this opinion this Court will so reapportion the State of Texas"; and for its order that the Secretary of State "adopt and implement any and all procedures necessary to properly effectuate the orders of this Court in conformance with this Opinion . . . ." 343 F. Supp., at 737. In these circumstances, although appellants could not have directly appealed to this Court the entry of a declaratory judgment unaccompanied by any injunctive relief, *Gunn* v. *University Committee,* 399 U. S. 383 (1970); *Mitchell* v. *Donovan,* 398 U. S. 427 (1970), we conclude that we have jurisdiction of the entire appeal. *Roe* v. *Wade,* 410 U. S. 113 (1973); *Florida Lime & Avocado Growers* v. *Jacobsen,* 362 U. S. 73 (1960). With the Texas reapportionment plan before it, it was in the interest of judicial economy and the avoidance of piecemeal litigation that the three-judge District Court have jurisdiction over all claims raised against the statute when a substantial constitutional claim was alleged, and an appeal to us, once properly here, has the same reach. *Roe* v. *Wade, supra,* at 123; *Carter* v. *Jury Comm'n,* 396 U. S. 320 (1970); *Florida Lime & Avocado Growers* v. *Jacobsen, supra,* at 80.

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[4] Title 28 U. S. C. § 1253 provides:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

II

The reapportionment plan for the Texas House of Representatives provides for 150 representatives to be selected from 79 single-member and 11 multimember districts. The ideal district is 74,645 persons. The districts range from 71,597 to 78,943 in population per representative, or from 5.8% overrepresentation to 4.1% underrepresentation. The total variation between the largest and smallest district is thus 9.9%[5]

The District Court read our prior cases to require any deviations from equal population among districts to be justified by "acceptable reasons" grounded in state policy; relied on *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969), to conclude that the permissible tolerances suggested by *Reynolds* v. *Sims,* 377 U. S. 533 (1964), had been substantially eroded; suggested that *Abate* v. *Mundt,* 403 U. S. 182 (1971), in accepting total deviations of 11.9% in a county reapportionment was *sui generis;* and considered the "critical issue" before it to be whether "the State [has] justified any and all variances, however small, on the basis of a consistent, rational State policy." 343 F. Supp., at 713. Noting the single fact that the total deviation from the ideal between District 3 and District 85 was 9.9%, the District Court concluded that justification by appellants was called for and could discover no acceptable state policy to support the deviations. The District Court was also critical of the actions and procedures of the Legislative Reapportionment Board and doubted "that [the] board did the sort of deliberative job . . . worthy of judicial abstinence." *Id.,* at 717. It also considered the combination of single-member and multimember districts in the House plan "haphazard," particularly in providing single-member districts in Houston and multimember districts in other metropolitan areas, and that this "irrationality, without reasoned justification, may be a separate and distinct ground for declaring the plan unconstitutional."[6] *Ibid.*

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[5] See Appendix to opinion of the Court, *post,* p. 770.

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[6] It may be, although we are not sure, that the District Court would have invalidated the plan statewide because of what it thought was an irrational mixture of multimember and single-member districts. Thus, in questioning the use of single-member districts in Houston but multimember districts in all other urban areas, and remarking that the State had provided neither "compelling" nor "rational" explanation for the differing treatment, the District Court merely concluded that this classification "may be" an independent ground for invalidating the plan. But there are no authorities in this Court for the proposition that the mere mixture of multimember and single-member districts in a single plan, even among urban areas, is in-

Finally, the court specifically invalidated the use of multimember districts in Dallas and Bexar Counties as unconstitutionally discriminatory against a racial or ethnic group.

The District Court's ultimate conclusion was that "the apportionment plan for the State of Texas is unconstitutional as unjustifiably remote from the ideal of 'one man, one vote,' and that the multi-member districting schemes for the House of Representatives as they relate specifically to Dallas and to Bexar Counties are unconstitutional in that they dilute the votes of racial minorities." *Id.*, at 735.[7]

Insofar as the District Court's judgment rested on the conclusion that the population differential of 9.9% from the ideal district between District 3 and District 85 made out a prima facie equal protection violation under the Fourteenth Amendment, absent special justification, the court was in error. It is plain from *Mahan* v. *Howell*, 410 U. S. 315 (1973), and *Gaffney* v. *Cummings*, *ante*, p. 735, that state reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats. *Kirkpatrick* v. *Preisler* did not dilute the tolerances contemplated by *Reynolds* v. *Sims* with respect to state districting, and we did not hold in *Swann* v. *Adams*, 385 U. S. 440 (1967), or *Kilgarlin* v. *Hill*, 386 U. S. 120 (1967), or

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vidiously discriminatory, and we construe the remarks not as part of the District Court's declaratory judgment invalidating the state plan but as mere advance advice to the Texas Legislature as to what would or would not be acceptable to the District Court.

[7] The District Court also concluded, contrary to the assertions of certain plaintiffs, that the Senate districting scheme for Bexar County did not "unconstitutionally dilute the votes of any political faction or party." 343 F. Supp. 704, 735. The majority of the District Court also concluded that the Senate districting scheme for Harris County did not dilute black votes.

later in *Mahan* v. *Howell, supra,* that *any* deviations from absolute equality, however small, must be justified to the satisfaction of the judiciary to avoid invalidation under the Equal Protection Clause. For the reasons set out in *Gaffney* v. *Cummings, supra,* we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation. Those reasons are as applicable to Texas as they are to Connecticut; and we cannot glean an equal protection violation from the single fact that two legislative districts in Texas differ from one another by as much as 9.9%, when compared to the ideal district. Very likely, larger differences between districts would not be tolerable without justification "based on legitimate considerations incident to the effectuation of a rational state policy," *Reynolds* v. *Sims,* 377 U. S., at 579; *Mahan* v. *Howell, supra,* at 325, but here we are confident that appellees failed to carry their burden of proof insofar as they sought to establish a violation of the Equal Protection Clause from population variations alone. The total variation between two districts was 9.9%, but the average deviation of all House districts from the ideal was 1.82%. Only 23 districts, all single-member, were overrepresented or underrepresented by more than 3%, and only three of those districts by more than 5%. We are unable to conclude from these deviations alone that appellees satisfied the threshold requirement of proving a prima facie case of invidious discrimination under the Equal Protection Clause. Because the District Court had a contrary view, its judgment must be reversed in this respect.[8]

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[8] The court's conclusion that the variations in this case were not justified by a rational state policy would, in any event, require re-

III

We affirm the District Court's judgment, however, insofar as it invalidated the multimember districts in Dallas and Bexar Counties and ordered those districts to be redrawn into single-member districts. Plainly, under our cases, multimember districts are not *per se* unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State. *Whitcomb* v. *Chavis,* 403 U. S. 124 (1971); *Mahan* v. *Howell, supra;* see *Burns* v. *Richardson,* 384 U. S. 73 (1966); *Fortson* v. *Dorsey,* 379 U. S. 433 (1965); *Lucas* v. *Colorado General Assembly,* 377 U. S. 713 (1964); *Reynolds* v. *Sims, supra.*[9] But we have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups. See *Whitcomb* v. *Chavis, supra; Burns* v. *Richardson, supra; Fortson* v. *Dorsey, supra.* To sustain such claims, it is not enough that the racial group al-

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consideration and reversal under *Mahan* v. *Howell,* 410 U. S. 315 (1973). The Texas Constitution, Art. III, § 26, expresses the state policy against cutting county lines wherever possible in forming representative districts. The District Court recognized the policy but, without the benefit of *Mahan* v. *Howell,* may have thought the variations too great to be justified by that policy. It perhaps thought also that the policy had not been sufficiently or consistently followed here. But it appears to us that to stay within tolerable population limits it was necessary to cut some county lines and that the State achieved a constitutionally acceptable accommodation between population principles and its policy against cutting county lines in forming representative districts.

[9] See *Whitcomb* v. *Chavis,* 403 U. S. 124, 141–148 (1971), and the cases discussed in n. 22 of that opinion, including *Kilgarlin* v. *Hill,* 386 U. S. 120 (1967), where we affirmed the District Court's rejection of petitioners' contention that the combination of single-member, multimember, and floterial districts in a single reapportionment plan was "an unconstitutional 'crazy quilt.'" *Id.,* at 121.

legedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. *Whitcomb* v. *Chavis, supra,* at 149–150.

With due regard for these standards, the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes. 343 F. Supp., at 725. It referred also to the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election and to the so-called "place" rule limiting candidacy for legislative office from a multimember district to a specified "place" on the ticket, with the result being the election of representatives from the Dallas multimember district reduced to a head-to-head contest for each position. These characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination, the District Court thought.[10] More fundamentally, it found that since Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that is in effective control of Democratic Party candidate slating in Dallas County.[11] That organization, the District Court found, did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community. The court found that as recently as 1970 the DCRG was relying upon "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community." *Id.*, at 727. Based on the evidence before it, the District Court concluded that "the black community has been effectively excluded from participation in the Democratic primary selection process," *id.*, at 726, and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner. These findings and conclusions are sufficient to sustain the District Court's judgment with respect to the Dallas multimember district and, on this record, we have no reason to disturb them.

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[10] There is no requirement that candidates reside in subdistricts of the multimember district. Thus, all candidates may be selected from outside the Negro residential area.

IV

The same is true of the order requiring disestablishment of the multimember district in Bexar County. Consistently with *Hernandez* v. *Texas,* 347 U. S. 475 (1954), the District Court considered the Mexican-Americans in Bexar County to be an identifiable class for Fourteenth Amendment purposes and proceeded to inquire whether the impact of the multimember district on this group constituted invidious discrimination. Surveying the historic and present condition of the Bexar County Mexican-American community, which is concentrated for the most part on the west side of the city of San Antonio, the court observed, based upon prior cases and the record before it, that the Bexar community, along with other Mexican-Americans in Texas,[12] had long "suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others." 343 F. Supp., at 728. The bulk of the Mexican-American community in Bexar County occupied the Barrio, an area consisting of about 28 contiguous census tracts in the city of San Antonio. Over 78% of Barrio residents were Mexican-Americans, making up 29% of the county's total population. The Barrio is an area of poor housing; its residents have low income and a high rate of unemployment. The typical Mexican-American suffers a cultural and language barrier[13] that makes his participation in community processes extremely difficult, particularly, the court thought, with respect to the political life of Bexar County. "[A] cultural incompatability . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary." 343 F. Supp., at 731. The residual impact of this history reflected itself in the fact that Mexican-American voting registration remained very poor in the county and that only five Mexican-Americans since 1880 have served in the Texas Legislature from

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[11] The District Court found that "it is extremely difficult to secure either a representative seat in the Dallas County delegation or the Democratic primary nomination without the endorsement of the Dallas Committee for Responsible Government." 343 F. Supp., at 726.

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[12] Mexican-Americans constituted approximately 20% of the population of the State of Texas.

[13] The District Court found that "[t]he fact that [Mexican-Americans] are reared in a sub-culture in which a dialect of Spanish is the primary language provides permanent impediments to their educational and vocational advancement and creates other traumatic problems." 343 F. Supp., at 730.

Bexar County. Of these, only two were from the Barrio area.[14] The District Court also concluded from the evidence that the Bexar County legislative delegation in the House was insufficiently responsive to Mexican-American interests.

Based on the totality of the circumstances, the District Court evolved its ultimate assessment of the multimember district, overlaid, as it was, on the cultural and economic realities of the Mexican-American community in Bexar County and its relationship with the rest of the county. Its judgment was that Bexar County Mexican-Americans "are effectively removed from the political processes of Bexar [County] in violation of all the *Whitcomb* standards, whatever their absolute numbers may total in that County." *Id.*, at 733. Single-member districts were thought required to remedy "the effects of past and present discrimination against Mexican-Americans," *ibid.*, and to bring the community into the full stream of political life of the county and State by encouraging their further registration, voting, and other political activities.

The District Court apparently paid due heed to *Whitcomb* v. *Chavis, supra,* did not hold that every racial or political group has a constitutional right to be represented in the state legislature, but did, from its own special vantage point, conclude that the multimember district, as designed and operated in Bexar County, invidiously excluded Mexican-Americans from effective participation in political life, specifically in the election of representatives to the Texas House of Representatives. On the record before us, we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise.

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[14] Two other residents of the Barrio, a Negro and an Anglo-American, have also served in the Texas Legislature.

Affirmed in part, reversed in part, and remanded.

APPENDIX TO OPINION OF THE COURT

The Redistricting Board's plan embodied the following districts:

District	Population	Average Multi-member	(Under) Over	Percent Deviation Over (Under)
1	76,285		1,640	2.2
2	77,102		2,457	3.3
3	78,943		4,298	5.8
4	71,928		(2,717)	(3.6)
5	75,014		369	.5
6	76,051		1,406	1.9
7 (3)	221,314	73,771	(874)	(1.2)
8	74,303		(342)	(.5)
9	76,813		2,168	2.9
10	72,410		(2,235)	(3.0)
11	73,136		(1,509)	(2.0)
12	74,704		59	.1
13	75,929		1,284	1.7
14	76,597		1,952	2.6
15	76,701		2,056	2.8
16	74,218		(427)	(.6)
17	72,941		(1,704)	(2.3)
18	77,159		2,514	3.4
19 (2)	150,209	75,104	459	.6
20	75,592		947	1.3
21	74,651		6	.0
22	73,311		(1,334)	(1.8)
23	75,777		1,132	1.5
24	73,966		(679)	(.9)
25	75,633		988	1.3
26 (18)	1,327,321	73,740	(905)	(1.2)
27	77,788		3,143	4.2
28	72,367		(2,278)	(3.1)
29	76,505		1,860	2.5
30	77,008		2,363	3.2
31	75,025		380	.5
32 (9)	675,499	75,055	410	.5
33	73,071		(1,574)	(2.1)
34	76,071		1,426	1.9
35 (2)	147,553	73,777	(868)	(1.2)
36	74,633		(12)	(.0)
37 (4)	295,516	73,879	(766)	(1.0)

APPENDIX—*Continued*

District	Population	Average Multi-member	(Under) Over	Percent Deviation Over (Under)
38	78,897		4,252	5.7
39	77,363		2,718	3.6
40	71,597		(3,048)	(4.1)
41	73,678		(967)	(1.3)
42	74,706		61	.1
43	74,160		(485)	(.6)
44	75,278		633	.8
45	78,090		3,445	4.6
46 (11)	826,698	75,154	509	.7
47	76,319		1,674	2.2
48 (3)	220,056	73,352	(1,293)	(1.7)
49	76,254		1,609	2.2
50	74,268		(377)	(.5)
51	75,800		1,155	1.5
52	76,601		1,956	2.6
53	74,499		(146)	(.2)
54	77,505		2,860	3.8
55	76,947		2,302	3.1
56	74,070		(575)	(.8)
57	77,211		2,566	3.4
58	75,120		475	.6
59 (2)	144,995	72,497	(2,148)	(2.9)
60	75,054		409	.5
61	73,356		(1,289)	(1.7)
62	72,240		(2,405)	(3.2)
63	75,191		546	.7
64	74,546		(99)	(.1)
65	75,720		1,075	1.4
66	72,310		(2,335)	(3.1)
67	75,034		389	.5
68	74,524		(121)	(.2)
69	74,765		120	.2
70	77,827		3,182	4.3
71	73,711		(934)	(1.3)
72 (4)	297,770	74,442	(203)	(.3)
73	74,309		(336)	(.5)
74	73,743		(902)	(1.2)
75 (2)	147,722	73,861	(784)	(1.1)
76	76,083		1,438	1.9
77	77,704		3,059	4.1
78	71,900		(2,745)	(3.7)
79	75,164		519	.7
80	75,111		466	.6
81	75,674		1,029	1.4
82	76,006		1,361	1.8

APPENDIX—*Continued*

District	Population	Average Multi-member	(Under) Over	Percent Deviation Over (Under)
83	75,752		1,107	1.5
84	75,634		989	1.3
85	71,564		(3,081)	(4.1)
86	73,157		(1,488)	(2.0)
87	73,045		(1,600)	(2.1)
88	75,076		431	.6
89	74,206		(439)	(.6)
90	74,377		(268)	(.4)
91	73,381		(1,264)	(1.7)
92	71,908		(2,737)	(3.7)
93	72,761		(1,884)	(2.5)
94	73,328		(1,317)	(1.8)
95	73,825		(820)	(1.1)
96	72,505		(2,140)	(2.9)
97	74,202		(443)	(.6)
98	72,380		(2,265)	(3.0)
99	74,123		(522)	(.7)
100	75,682		1,037	1.4
101	75,204		559	.7

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting in No. 71–1476, *ante,* p. 735, and concurring in part and dissenting in part in No. 72–147.

The Court today upholds statewide legislative apportionment plans for Connecticut and Texas, even though these plans admittedly entail substantial inequalities in the population of the representative districts, and even though the States have made virtually no attempt to justify their failure "to construct districts . . . as nearly of equal population as is practicable." *Reynolds* v. *Sims,* 377 U. S. 533, 577 (1964). In reaching this conclusion, the Court sets aside the judgment of the United States District Court for the District of Connecticut holding the Connecticut plan invalid, and the judgment of the United States District Court for the Western District of Texas reaching a similar result as to the Texas plan. In the Texas case, the Court does affirm, however, the District Court's determination that the use of multimember districts in Dallas and Bexar Counties had the unconstitutional effect of minimizing the voting strength of racial groups.[1] See *Whitcomb* v. *Chavis,* 403 U. S. 124, 142–144 (1971); *Burns* v. *Richardson,* 384 U. S. 73, 88 (1966); *Fortson* v. *Dorsey,* 379 U. S. 433, 439 (1965). With that latter conclusion I am in full agreement, as I also agree with and join Part I of the Court's opinion in No. 72–147, *White* v. *Regester.* But the decision to uphold the state apportionment schemes reflects a substantial and very unfortunate retreat from the principles established in our earlier cases, and I therefore must state my dissenting views.

I

At issue in No. 71–1476, *Gaffney* v. *Cummings,* is the 1971 reapportionment plan for election of members of the House of Representatives of Connecticut. The plan was premised on a 151-member House, with each member elected from a single-member district. Since the population of the State was 3,032,217, according to 1970 census data, the ideal would fix the population of each district at 20,081. In fact, the population of many districts deviated substantially from the ideal, ranging from a district underrepresented by 3.93% to one overrepresented by 3.9%. The total spread of deviation—a figure deemed relevant in each of our earlier decisions—was 7.83%. The population of 39 assembly districts deviated from the average by more than 3%. Another 34 districts deviated by more than 2%. The average deviation was just under 2%. To demonstrate that the state plan did not achieve the greatest practicable degree of equality in per-district population, appellees submitted a number of proposed apportionment plans, including one that would have significantly reduced the extent of inequality. The total range of deviation under appellees' plan would have been 2.61%, as compared to 7.83% under the state plan.

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[1] In *Fortson* v. *Dorsey,* 379 U. S. 433 (1965), we held that a multimember district is not *per se* unconstitutional under the Equal Protection Clause, even though we had previously recognized certain inherently undesirable features of the device. See *Lucas* v. *Colorado General Assembly,* 377 U. S. 713, 731 n. 21 (1964). We have concluded, however, that the use of the device is, in fact, unconstitutional, where it operates to "'minimize or cancel out the voting strength of racial or political elements of the voting population,'" *Burns* v. *Richardson,* 384 U. S. 73, 88 (1966), quoting from *Fortson* v. *Dorsey, supra,* at 439. Today's decision is the first in which we have sustained an attack on the use of multimember districts. Cf. *Whitcomb* v. *Chavis,* 403 U. S. 124, 144 (1971).

The District Court held the state plan invalid on the ground that "the deviations from equality of populations of the . . . House districts are not justified by any sufficient state interest."[2] 341 F. Supp. 139, 148 (Conn. 1972). Instead of adopting one of appellees' plans, the court appointed a Special Master to chart a new plan, and his effort produced a scheme with a total range of deviation of only 1.16%. In overturning the District Court's decision, the Court does not conclude, as it did earlier this Term in *Mahan* v. *Howell*, 410 U. S. 315 (1973), that the District Court failed to discern the State's sufficient justification for the deviations. Indeed, in view of appellant's halfhearted attempts to justify

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[2] With regard to the senatorial districts, the 1971 plan produced a total variance of 1.81%. Although appellees did not specifically challenge the apportionment of senatorial districts, the District Court properly concluded that its finding of unconstitutional deviation in one house required invalidation of the entire apportionment plan. *Maryland Committee for Fair Representation* v. *Tawes*, 377 U. S. 656, 673 (1964); *Lucas* v. *Colorado General Assembly*, *supra*, at 735. *Burns* v. *Richardson*, *supra*, at 83.

the deviations at issue here, such a conclusion could hardly be supported. Whereas the Commonwealth of Virginia made a substantial effort to draw district lines in conformity with the boundaries of political subdivisions—an effort that was found sufficient in *Mahan* v. *Howell* to validate a plan with total deviation of 16.4%—the evidence in the case before us requires the conclusion that Connecticut's apportionment plan was drawn in complete disregard of political subdivision lines. The District Court pointed out that "[t]he boundary lines of 47 towns are cut under the Plan so that one or more portions of each of these 47 towns are added to another town or a portion of another town to form an assembly district." 341 F. Supp., at 142. Moreover, the boundary lines of 29 of these 47 towns were cut more than once, and the plan created "78 segments of towns in the formation of 151 assembly districts." *Ibid.*

Although appellant failed to offer cogent reasons in explanation of the substantial variations in district population, the Court nevertheless upholds the state plan. The Court reasons that even in the absence of any explanation for the failure to achieve equality, the showing of a total deviation of almost 8% does not make out a prima facie case of invidious discrimination under the Fourteenth Amendment. Deviations no greater than 8% are, in other words, to be deemed *de minimis,* and the State need not offer any justification at all for the failure to approximate more closely the ideal of *Reynolds* v. *Sims, supra.*

The Texas reapportionment case, No. 72–147, *White* v. *Regester,* presents a similar situation, except that the range of deviation in district population is greater and the State's justifications are, if anything, more meager. An ideal district in Texas, which chooses the 150 members of the State House of Representatives from 79 single-member and 11 multimember districts, is 74,645. As defined in the State's 1970 plan, a substantial number of districts departed significantly from the ideal. The total range of deviation was at least 9.9%, and arguably almost 30%, depending on the mode of calculation.[3] The District Court pointed out that

> "[i]n all of the evidence presented in this case, the State has not attempted to explain in terms of rational State policy its failure to create districts equal in population as nearly as practicable, nor has the State sought to justify a single deviation from precise mathematical equality. The lengthy depositions of the members of the legislative redistricting board and of the staff members who did the actual drawing of the legislative district lines are devoid of any meaningful indications of the standards used." 343 F. Supp. 704, 714 (WD Tex. 1972).

As the District Court's opinion makes clear, the variations surely cannot be defended as a necessary byproduct of a state effort to avoid fragmentation of political subdivisions. Nevertheless, the Court today sets aside the District Court's decision, reasoning, as in the Connecticut case, that a showing of as much as 9.9% total deviation still does not establish a prima facie case under the Equal Protection Clause of the Fourteenth Amendment. Since the Court expresses no misgivings about our recent decision in *Abate* v. *Mundt*, 403 U. S. 182 (1971), where we held that a total deviation of 11.9% must be justified by the State, one can reasonably surmise that a line has been drawn at 10%—deviations in excess of that amount are apparently acceptable only on a showing of justification by the State; deviations less than that amount require no justification whatsoever.

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[3] The District Court pointed out that "the State's method of computing deviations in the multi-member districts may distort the actual percentage deviations in those eleven districts. . . . Since we have concluded that the 9.9% total deviation is not the result of a good faith attempt to achieve population equality as nearly as practicable, it is unnecessary for us to resolve this complex computational conflict." 343 F. Supp. 704, 713 n. 5. A similar conflict existed in *Mahan* v. *Howell*, 410 U. S. 315 (1973), as I pointed out in my dissenting opinion, *id.*, at 333, and there too the Court declined to indicate any awareness of the dispute.

II

The proposition that certain deviations from equality of district population are so small as to lack constitutional significance, while repeatedly urged on this Court by States that failed to achieve precise equality, has never before commanded a majority of the Court.[4] Indeed, in *Kirkpatrick* v. *Preisler*, 394 U. S. 526, 530 (1969), we expressly rejected the argument

> "that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard. The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case."

The Court reasons, however, that *Kirkpatrick* v. *Preisler*,

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[4] There is a statement, to be sure, in *Swann* v. *Adams*, 385 U. S. 440, 444 (1967), that "[*d*]*e minimis* deviations are unavoidable," but that statement must be viewed in context. By way of clarification, the Court immediately added that "the *Reynolds* opinion limited the allowable deviations to those minor variations which 'are based on legitimate considerations incident to the effectuation of a rational state policy.' 377 U. S. 533, 579." *Ibid.* Similarly, the Court noted, quoting from *Roman* v. *Sincock*, 377 U. S. 695, 710 (1964), that "the Constitution permits 'such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.'" 385 U. S., at 444. *Swann* v. *Adams* does not, in my view, suggest any support for the proposition that deviations as great as 10% are tolerable in the absence of any justification or explanation by the State.

supra, a case that concerned the division of Missouri into congressional districts, has no application to the apportionment of seats in a state legislature. In my dissenting opinion in *Mahan* v. *Howell, supra,* I pointed out that the language, reasoning, and background of the *Kirkpatrick* decision all command the conclusion that our holding there is applicable to state legislative apportionment no less than to congressional districting. In fact, this Court specifically recognized as much in the context of a challenge to an Arizona apportionment scheme in *Ely* v. *Klahr,* 403 U. S. 108 (1971). Describing the opinion of the District Court whose judgment was under review, we noted that the court below had "properly concluded that this plan was invalid under *Kirkpatrick* v. *Preisler,* 394 U. S. 526 (1969), and *Wells* v. *Rockefeller,* 394 U. S. 542 (1969), since the legislature had operated on the notion that a 16% deviation was *de minimis* and consequently made no effort to achieve greater equality." 403 U. S., at 111. Yet it is precisely such a notion that the Court today approves.[5]

Moreover, even if *Kirkpatrick* should be deemed inapplicable to the apportionment of state legislative districts, the reasoning that gave rise to our rejection of a

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[5] By contrast, in *Mahan* v. *Howell, supra,* the Court expressly reaffirmed the holding of *Reynolds* v. *Sims,* 377 U. S. 533 (1964), that "some deviations from the equal-population principle are constitutionally permissible" "[s]*o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy.*" *Id.,* at 579, quoted in *Mahan* v. *Howell, supra,* at 325 (emphasis added). In my view, the Court incorrectly concluded in *Mahan* v. *Howell* that Virginia had justified the population variations at issue there. Nevertheless, the Court did follow the line of analysis prescribed in our earlier decisions—requiring the State to justify every deviation from precise equality. The approach of *Mahan* is, therefore, directly at odds with the approach adopted today. See also, *e. g., Abate* v. *Mundt,* 403 U. S. 182, 185 (1971); *Kilgarlin* v. *Hill,* 386 U. S. 120, 122 (1967); *Swann* v. *Adams, supra,* at 443–446.

de minimis approach is fully applicable to the case before us. We pointed out there that the "as nearly as practicable" standard—the standard that controls legislative apportionment as well as congressional districting, *Reynolds* v. *Sims, supra,* at 577—demands that "the State make a good-faith effort to achieve precise mathematical equality. . . . Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes." 394 U. S., at 530–531. *Kirkpatrick* recognized that "to consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable." 394 U. S., at 531.

Although not purporting to quarrel with the principle that precise mathematical equality is the constitutionally mandated goal of reapportionment, the Court today establishes a wide margin of tolerable error, and thereby undermines the effort to effectuate the principle. For it is clear that the state legislatures and the state and federal courts have viewed *Kirkpatrick* as controlling on the issue of legislative apportionment, and the outgrowth of that assumption has been a truly extraordinary record of compliance with the constitutional mandate. Appellees in No. 71–1476 make the point forcefully by comparing the extent of inequality in the population of legislative districts prior to 1969, the year of our decision in *Kirkpatrick*, with the extent of inequality in subsequent years.[6] Prior to 1969, the range of variances in population of state senatorial districts exceeded 15% in 44 of the 50 States. Three States had reduced the total variance to between 10% and 15%; two had cut the variance to between 5% and 10%; only one had reduced the variance below 5%. The record of apportionment of state House districts was even less encouraging. Variances in excess of 15% characterized all but two of the States, and only one of these had brought the total variance under 10%. The improvement in the post-1969 years could not have been more dramatic. The table provided by appellees, set out in full in the margin,[7] reveals that in almost one-half of the States the total variance in population of senatorial districts was within 5% to zero. Of the 45 States as to which information was available, 32 had reduced the total variance below 10% and only eight had failed to bring the total variance below 15%. With regard to House districts the improvement is similar. On the basis of information concerning 42 States, it appears that 20 had achieved a total variance of less than 5%, and only 14 retained districts with a total variance of more than 15% from the constitutional ideal.

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[6] Appellees' figures are compiled from a table entitled Apportionment of Legislatures, in 17 Council of State Governments, the Book of the States: 1968–1969, pp. 66–67 (1968), and from Council of State Governments, Reapportionment in the Seventies (1973).

To appreciate the significance of this encouraging development, it is important to understand that the demand for precise mathematical equality rests neither on

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[7] Deviations After 1970

Range of Deviations	Number of States	Percentage of States
	Senate:	
Under 1%	3	6.7%
1–5%	21	46.7%
5–10%	8	17.8%
10–15%	5	11.1%
Over 15%	8	17.8%
	House:	
Under 1%	4	9.5%
1–5%	16	38.1%
5–10%	8	19.1%
10–15%	4	9.5%
Over 15%	10	23.8%

a scholastic obsession with abstract numbers nor a rigid insensitivity to the political realities of the reapportionment process. Our paramount concern has remained an individual and personal right—the right to an equal vote. "While the result of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote." *Reynolds* v. *Sims*, *supra*, at 561. We have demanded equality in district population precisely to insure that the weight of a person's vote will not depend on the district in which he lives. The conclusion that a State may, without any articulated justification, deliberately weight some persons' votes more heavily than others, seems to me fundamentally at odds with the purpose and rationale of our reapportionment decisions. Regrettably, today's decisions are likely to jeopardize the very substantial gains that have been made during the last four years.

Moreover, if any approach ascribes too much importance to abstract numbers and too little to the realities of malapportionment, it is not *Kirkpatrick*'s demand for precise equality in district population, but rather the Court's own *de minimis* approach. By establishing an arbitrary cutoff point expressed in terms of total percentage variance from the constitutional ideal, the Court fails to recognize that percentage figures tend to hide the total number of persons affected by unequal weighting of votes. In the Texas case, for example, the District Court pointed out that

> "the total deviations for Dallas and Bexar Counties, respectively, amount to about 16,000 people and 5,500 people, for a total of around 21,500 people.

> The percentage deviation figures are only a shorthand method of expressing the 'loss,' dilution, or disproportionate weighting of votes. Just as the Court in *Reynolds* concluded that legislators represent people, not trees or cows, so we would emphasize that legislators represent people, not percentages of people." 343 F. Supp., at 713 n. 5.

Finally, it is no answer to suggest that precise mathematical equality is an unsatisfactory goal in view of the inevitable inaccuracies of the census data on which the plans are based. That argument, which we implicitly rejected in *Kirkpatrick* v. *Preisler, supra,*[8] mixes two distinct questions. In the first place, a state apportionment plan must be grounded on the most accurate available data, and the unreliability of the data may itself necessitate the invalidation of the plan. But once the data are established, the State's constitutional obligation is to achieve the highest practicable degree of equality with reference to the information at hand. In my view, the District Courts properly concluded that neither Texas nor Connecticut had satisfied this obligation. I would therefore affirm both judgments.

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[8] See 394 U. S., at 538–540 (1969) (Fortas, J., concurring); *Wells* v. *Rockefeller*, 394 U. S. 542, 554 (1969) (WHITE, J., dissenting).

SOUTH CAROLINA *v.* KATZENBACH, ATTORNEY GENERAL.

ON BILL OF COMPLAINT.

No. 22, Orig. Argued January 17-18, 1966.—Decided March 7, 1966.

Invoking the Court's original jurisdiction under Art. III, § 2, of the Constitution, South Carolina filed a bill of complaint seeking a declaration of unconstitutionality as to certain provisions of the Voting Rights Act of 1965 and an injunction against their enforcement by defendant, the Attorney General. The Act's key features, aimed at areas where voting discrimination has been most flagrant, are: (1) A coverage formula or "triggering mechanism" in § 4 (b) determining applicability of its substantive provisions; (2) provision in § 4 (a) for temporary suspension of a State's voting tests or devices; (3) procedure in § 5 for review of new voting rules; and (4) a program in §§ 6 (b), 7, 9, and 13 (a) for using federal examiners to qualify applicants for registration who are thereafter entitled to vote in all elections. These remedial sections automatically apply to any State or its subdivision which the Attorney General has determined maintained on November 1, 1964, a registration or voting "test or device" (a literacy, educational, character, or voucher requirement as defined in § 4 (c)) and in which according to the Census Director's determination less than half the voting-age residents were registered or voted in the 1964 presidential election. Statutory coverage may be terminated by a declaratory judgment of a three-judge District of Columbia District Court that for the preceding five years racially discriminatory voting tests or devices have not been used. No person in a covered area may be denied voting rights because of failure to comply with a test or device. § 4 (a). Following administrative determinations, enforcement was temporarily suspended of South Carolina's literacy test as well as of tests and devices in certain other areas. The Act further provides in § 5 that during the suspension period, a State or subdivision may not apply new voting rules unless the Attorney General has interposed no objection within 60 days of their submission to him, or a three-judge District of Columbia District Court has issued a declaratory judgment that such rules are not racially discriminatory. South Carolina wishes to apply a recent amendment to its voting laws without following these procedures. In any political subdivision where tests or devices have been suspended, the Civil Service Commission shall appoint voting examiners whenever the Attorney General has, after considering specified factors, duly certified receiving complaints of official racial voting discrimination from at least 20 residents or that the examiners' appointment is otherwise necessary under the Fifteenth Amendment. § 6 (b). Examiners are to transmit to the appropriate officials the names of applicants they find qualified; and such persons may vote in any election after 45 days following transmission of their names. § 7 (b). Removal by the examiners of names from voting lists is provided on loss of eligibility or on successful challenge under prescribed procedures. § 7 (d). The use of examiners is terminated if requested by the Attorney General or the political subdivision has obtained a declaratory judgment as specified in § 13 (a). Following certification by the Attorney General, federal examiners were appointed in two South Carolina counties as well as elsewhere in other States. Subsidiary cures for persistent voting discrimination and other special provisions are also contained in the Act. In addition to a general assault on the Act as unconstitutionally encroaching on States' rights, specific constitutional challenges by plaintiff and certain *amici curiae* are: The coverage formula violates the principle of equality between the States, denies due process through an invalid presumption, bars judicial review of administrative findings, is a bill of attainder, and legislatively adjudicates guilt; the review of new voting rules infringes Art. III by directing the District Court to issue advisory opinions; the assignment of federal examiners violates due process by foreclosing judicial review of administrative findings and impairs the separation of powers by giving the Attorney General judicial functions; the challenge procedure denies due process on account of its speed; and provisions for adjudication in the District of Columbia abridge due process by limiting litigation to a distant forum. *Held:*

1. This Court's judicial review does not cover portions of the Voting Rights Act of 1965 not challenged by plaintiff; nor does it extend to the Act's criminal provisions, as to which South Carolina's challenge is premature. Pp. 316–317.

2. The sections of the Act properly before this Court are a valid effectuation of the Fifteenth Amendment. Pp. 308–337.

(a) The Act's voluminous legislative history discloses unremitting and ingenious defiance in certain parts of the country of the Fifteenth Amendment (see paragraphs (b)-(d), *infra*) which Congress concluded called for sterner and more elaborate measures than those previously used. P. 309.

(b) Beginning in 1890, a few years before repeal of most of the legislation to enforce the Fifteenth Amendment, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia enacted tests, still in use, specifically designed to prevent Negroes from voting while permitting white persons to vote. Pp. 310-311.

(c) A variety of methods was used thereafter to keep Negroes from voting, one of the principal means being through racially discriminatory application of voting tests. Pp. 311-313.

(d) Case-by-case litigation against voting discrimination under the Civil Rights Acts of 1957, 1960, and 1964, has not appreciably increased Negro registration. Voting suits have been onerous to prepare, protracted, and where successful have often been followed by a shift in discriminatory devices, defiance or evasion of court orders. Pp. 313-315.

(e) A State is not a "person" within the meaning of the Due Process Clause of the Fifth Amendment; nor does it have standing to invoke the Bill of Attainder Clause of Art. I or the principle of separation of powers, which exist only to protect private individuals or groups. Pp. 323-324.

(f) Congress, as against the reserved powers of the States, may use any rational means to effectuate the constitutional prohibition of racial voting discrimination. P. 324.

(g) The Fifteenth Amendment, which is self-executing, supersedes contrary exertions of state power, and its enforcement is not confined to judicial invalidation of racially discriminatory state statutes and procedures or to general legislative prohibitions against violations of the Amendment. Pp. 325, 327.

(h) Congress, whose power to enforce the Fifteenth Amendment has repeatedly been upheld in the past, is free to use whatever means are appropriate to carry out the objects of the Constitution. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Ex parte Virginia,* 100 U. S. 339, 345-346. Pp. 326-327.

(i) Having determined case-by-case litigation inadequate to deal with racial voting discrimination, Congress has ample authority to prescribe remedies not requiring prior adjudication. P. 328.

(j) Congress is well within its powers in focusing upon the geographic areas where substantial racial voting discrimination had occurred. Pp. 328–329.

(k) Congress had reliable evidence of voting discrimination in a great majority of the areas covered by § 4 (b) of the Act and is warranted in inferring a significant danger of racial voting discrimination in the few other areas to which the formula in § 4 (b) applies. Pp. 329–330.

(l) The coverage formula is rational in theory since tests or devices have so long been used for disenfranchisement and a lower voting rate obviously results from such disenfranchisement. P. 330.

(m) The coverage formula is rational as being aimed at areas where widespread discrimination has existed through misuse of tests or devices even though it excludes certain areas where there is voting discrimination through other means. The Act, moreover, strengthens existing remedies for such discrimination in those other areas. Pp. 330–331.

(n) The provision for termination at the behest of the States of § 4 (b) coverage adequately deals with possible overbreadth; nor is the burden of proof imposed on the States unreasonable. Pp. 331–332.

(o) Limiting litigation to a single court in the District of Columbia is a permissible exercise of power under Art. III, § 1, of the Constitution, previously exercised by Congress on other occasions. Pp. 331–332.

(p) The Act's bar of judicial review of findings of the Attorney General and Census Director as to objective data is not unreasonable. This Court has sanctioned withdrawal of judicial review of administrative determinations in numerous other situations. Pp. 332–333.

(q) Congress has power to suspend literacy tests, it having found that such tests were used for discriminatory purposes in most of the States covered; their continuance, even if fairly administered, would freeze the effect of past discrimination; and re-registration of all voters would be too harsh an alternative. Such States cannot sincerely complain of electoral dilution by Negro illiterates when they long permitted white illiterates to vote. P. 334.

(r) Congress is warranted in suspending, pending federal scrutiny, new voting regulations in view of the way in which some States have previously employed new rules to circumvent adverse federal court decrees. P. 335.

(s) The provision whereby a State whose voting laws have been suspended under § 4 (a) must obtain judicial review of an amendment to such laws by the District Court for the District of Columbia presents a "controversy" under Art. III of the Constitution and therefore does not involve an advisory opinion contravening that provision. P. 335.

(t) The procedure for appointing federal examiners is an appropriate congressional response to the local tactics used to defy or evade federal court decrees. The challenge procedures contain precautionary features against error or fraud and are amply warranted in view of Congress' knowledge of harassing challenging tactics against registered Negroes. P. 336.

(u) Section 6 (b) has adequate standards to guide determination by the Attorney General in his selection of areas where federal examiners are to be appointed; and the termination procedures in § 13 (b) provide for indirect judicial review. Pp. 336–337.

Bill of complaint dismissed.

David W. Robinson II and *Daniel R. McLeod,* Attorney General of South Carolina, argued the cause for the plaintiff. With them on the brief was *David W. Robinson.*

Attorney General Katzenbach, defendant, argued the cause *pro se.* With him on the brief were *Solicitor General Marshall, Assistant Attorney General Doar, Ralph S. Spritzer, Louis F. Claiborne, Robert S. Rifkind, David L. Norman* and *Alan G. Marer.*

R. D. McIlwaine III, Assistant Attorney General, argued the cause for the Commonwealth of Virginia, as *amicus curiae,* in support of the plaintiff. With him on the brief were *Robert Y. Button,* Attorney General, and *Henry T. Wickham. Jack P. F. Gremillion,* Attorney General, argued the cause for the State of Louisiana, as *amicus curiae,* in support of the plaintiff. With him on the brief were *Harry J. Kron,* Assistant Attorney General, *Thomas W. McFerrin, Sr., Sidney W. Provensal, Jr.,* and *Alfred Avins. Richmond M. Flowers,* Attorney General, and *Francis J. Mizell, Jr.,* argued the cause for the State of Alabama, as *amicus curiae,* in support of the plaintiff. With them on the briefs were *George C. Wallace,* Governor of Alabama, *Gordon Madison,* Assistant Attorney General, and *Reid B. Barnes. Joe T. Patterson,* Attorney General, and *Charles Clark,* Special Assistant Attorney General, argued the cause for the State of Mississippi, as *amicus curiae,* in support of the plaintiff. With them on the brief was *Dugas Shands,* Assistant Attorney General. *E. Freeman Leverett,* Deputy Assistant Attorney General, argued the cause for the State of Georgia, as *amicus curiae,* in support of the plaintiff. With him on the brief was *Arthur K. Bolton,* Attorney General.

Levin H. Campbell, Assistant Attorney General, and *Archibald Cox,* Special Assistant Attorney General, argued the cause for the Commonwealth of Massachusetts, as *amicus curiae,* in support of the defendant. With *Mr. Campbell* on the brief was *Edward W. Brooke,* Attorney General, joined by the following States through their Attorneys General and other officials as follows: *Bert T. Kobayashi* of Hawaii; *John J. Dillon* of Indiana, *Theodore D. Wilson,* Assistant Attorney General, and *John O. Moss,* Deputy Attorney General; *Lawrence F. Scalise* of Iowa; *Robert C. Londerholm* of Kansas; *Richard J. Dubord* of Maine; *Thomas B. Finan* of Maryland; *Frank J. Kelley* of Michigan, and *Robert A. Derengoski,* Solicitor General; *Forrest H. Anderson* of Montana; *Arthur J. Sills* of New Jersey; *Louis J. Lefkowitz* of New York; *Charles Nesbitt* of Oklahoma, and *Charles L. Owens,* Assistant Attorney General; *Robert Y. Thornton* of Oregon; *Walter E. Alessandroni* of Pennsylvania; *J. Joseph Nugent* of Rhode Island; *John P. Connarn* of Vermont; *C. Donald Robertson* of West Virginia; and *Bronson C. LaFollette* of Wisconsin. *Alan B. Handler,* First Assistant Attorney General, argued the cause for the State of New Jersey, as *amicus curiae,* in support of the defendant. Briefs of *amici curiae*, in support of the defendant, were filed by *Thomas C. Lynch*, Attorney General, *Miles J. Rubin*, Senior Assistant Attorney General, *Dan Kaufmann*, Assistant Attorney General, and *Charles B. McKesson*, *David N. Rakov* and *Philip M. Rosten*, Deputy Attorneys General, for the State of California; and by *William G. Clark*, Attorney General, *Richard E. Friedman*, First Assistant Attorney General, and *Richard A. Michael* and *Philip J. Rock*, Assistant Attorneys General, for the State of Illinois.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

By leave of the Court, 382 U. S. 898, South Carolina has filed a bill of complaint, seeking a declaration that selected provisions of the Voting Rights Act of 1965[1] violate the Federal Constitution, and asking for an injunction against enforcement of these provisions by the Attorney General. Original jurisdiction is founded on the presence of a controversy between a State and a citizen of another State under Art. III, § 2, of the Constitution. See *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439. Because no issues of fact were raised in the complaint, and because of South Carolina's desire to obtain a ruling prior to its primary elections in June 1966, we dispensed with appointment of a special master and expedited our hearing of the case.

Recognizing that the questions presented were of urgent concern to the entire country, we invited all of the States to participate in this proceeding as friends of the Court. A majority responded by submitting or joining in briefs on the merits, some supporting South Carolina and others the Attorney General.[2] Seven of these States also requested and received permission to argue the case orally at our hearing. Without exception, despite the emotional overtones of the proceeding, the briefs and oral arguments were temperate, lawyerlike and constructive. All viewpoints on the issues have been fully developed, and this additional assistance has been most helpful to the Court.

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[1] 79 Stat. 437, 42 U. S. C. § 1973 (1964 ed., Supp. I).

[2] States supporting South Carolina: Alabama, Georgia, Louisiana, Mississippi, and Virginia. States supporting the Attorney General: California, Illinois, and Massachusetts, joined by Hawaii, Indiana,

The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. The Act creates stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country. Congress assumed the power to prescribe these remedies from § 2 of the Fifteenth Amendment, which authorizes the National Legislature to effectuate by "appropriate" measures the constitutional prohibition against racial discrimination in voting. We hold that the sections of the Act which are properly before us are an appropriate means for carrying out Congress' constitutional responsibilities and are consonant with all other provisions of the Constitution. We therefore deny South Carolina's request that enforcement of these sections of the Act be enjoined.

I.

The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects. Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting. The House and Senate Committees on the Judiciary each held hearings for nine days and received testimony from a total of 67 wit-

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Iowa, Kansas, Maine, Maryland, Michigan, Montana, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin.

nesses.[3] More than three full days were consumed discussing the bill on the floor of the House, while the debate in the Senate covered 26 days in all.[4] At the close of these deliberations, the verdict of both chambers was overwhelming. The House approved the bill by a vote of 328–74, and the measure passed the Senate by a margin of 79–18.

Two points emerge vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment. We pause here to summarize the majority reports of the House and Senate Committees, which document in considerable detail the factual basis for these reactions by Congress.[5] See H. R. Rep. No. 439, 89th Cong., 1st Sess., 8–16 (hereinafter cited as House Report); S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 3–16 (hereinafter cited as Senate Report).

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[3] See Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter cited as House Hearings); Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (hereinafter cited as Senate Hearings).

[4] See the Congressional Record for April 22, 23, 26, 27, 28, 29, 30; May 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26; July 6, 7, 8, 9; August 3 and 4, 1965.

[5] The facts contained in these reports are confirmed, among other sources, by *United States* v. *Louisiana,* 225 F. Supp. 353, 363–385 (Wisdom, J.), aff'd, 380 U. S. 145; *United States* v. *Mississippi,* 229 F. Supp. 925, 983–997 (dissenting opinion of Brown, J.), rev'd and rem'd, 380 U. S. 128; *United States* v. *Alabama,* 192 F. Supp. 677

The Fifteenth Amendment to the Constitution was ratified in 1870. Promptly thereafter Congress passed the Enforcement Act of 1870,[6] which made it a crime for public officers and private persons to obstruct exercise of the right to vote. The statute was amended in the following year[7] to provide for detailed federal supervision of the electoral process, from registration to the certification of returns. As the years passed and fervor for racial equality waned, enforcement of the laws became spotty and ineffective, and most of their provisions were repealed in 1894.[8] The remnants have had little significance in the recently renewed battle against voting discrimination.

Meanwhile, beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting.[9] Typically, they made the ability to read and write

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(Johnson, J.), aff'd, 304 F. 2d 583, aff'd, 371 U. S. 37; Comm'n on Civil Rights, Voting in Mississippi; 1963 Comm'n on Civil Rights Rep., Voting; 1961 Comm'n on Civil Rights Rep., Voting, pt. 2; 1959 Comm'n on Civil Rights Rep., pt. 2. See generally Christopher, The Constitutionality of the Voting Rights Act of 1965, 18 Stan. L. Rev. 1; Note, Federal Protection of Negro Voting Rights, 51 Va. L. Rev. 1051.

[6] 16 Stat. 140.

[7] 16 Stat. 433.

[8] 28 Stat. 36.

[9] The South Carolina Constitutional Convention of 1895 was a leader in the widespread movement to disenfranchise Negroes. Key, Southern Politics, 537–539. Senator Ben Tillman frankly explained to the state delegates the aim of the new literacy test: "[T]he only thing we can do as patriots and as statesmen is to take from [the 'ignorant blacks'] every ballot that we can under the laws of our national government." He was equally candid about the exemption from the literacy test for persons who could "understand" and "explain" a section of the state constitution: "There is no particle of fraud or illegality in it. It is just simply showing partiality, perhaps, [laughter,] or discriminating." He described the alternative exemp-

a registration qualification and also required completion of a registration form. These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write.[10] At the same time, alternate tests were prescribed in all of the named States to assure that white illiterates would not be deprived of the franchise. These included grandfather clauses, property qualifications, "good character" tests, and the requirement that registrants "understand" or "interpret" certain matter.

The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in *Guinn* v. *United States,* 238 U. S. 347, and *Myers* v. *Anderson,* 238 U. S. 368. Procedural hurdles were struck down in *Lane* v. *Wilson,* 307 U. S. 268. The white primary was outlawed in *Smith* v. *Allwright,* 321 U. S. 649, and *Terry* v. *Adams,* 345 U. S. 461. Improper challenges were nullified in *United States* v. *Thomas,* 362 U. S. 58. Racial gerrymandering was forbidden by *Gomillion* v. *Lightfoot,* 364 U. S. 339. Finally, discriminatory application of voting tests was condemned in *Schnell* v. *Davis,* 336 U. S. 933; *Alabama*

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tion for persons paying state property taxes in the same vein: "By means of the $300 clause you simply reach out and take in some more white men and a few more colored men." Journal of the Constitutional Convention of the State of South Carolina 464, 469, 471 (1895). Senator Tillman was the dominant political figure in the state convention, and his entire address merits examination.

[10] Prior to the Civil War, most of the slave States made it a crime to teach Negroes how to read or write. Following the war, these States rapidly instituted racial segregation in their public schools. Throughout the period, free public education in the South had barely begun to develop. See *Brown* v. *Board of Education,* 347 U. S. 483, 489–490, n. 4; 1959 Comm'n on Civil Rights Rep. 147–151.

v. *United States,* 371 U. S. 37; and *Louisiana* v. *United States,* 380 U. S. 145.

According to the evidence in recent Justice Department voting suits, the latter stratagem is now the principal method used to bar Negroes from the polls. Discriminatory administration of voting qualifications has been found in all eight Alabama cases, in all nine Louisiana cases, and in all nine Mississippi cases which have gone to final judgment.[11] Moreover, in almost all of these cases, the courts have held that the discrimination was pursuant to a widespread "pattern or practice." White applicants for registration have often been excused altogether from the literacy and understanding tests or have been given easy versions, have received extensive help from voting officials, and have been registered despite serious errors in their answers.[12] Negroes, on the other hand, have typically been required to pass difficult versions of all the tests, without any outside assistance and without the slightest error.[13] The good-morals requirement is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials.[14] Negroes obliged to obtain vouchers from registered voters have found it virtually impossible to comply in areas where almost no Negroes are on the rolls.[15]

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[11] For example, see three voting suits brought against the States themselves: *United States* v. *Alabama,* 192 F. Supp. 677, aff'd, 304 F. 2d 583, aff'd, 371 U. S. 37; *United States* v. *Louisiana,* 225 F. Supp. 353, aff'd, 380 U. S. 145; *United States* v. *Mississippi,* 339 F. 2d 679.

[12] A white applicant in Louisiana satisfied the registrar of his ability to interpret the state constitution by writing, "FRDUM FOOF SPETGH." *United States* v. *Louisiana,* 225 F. Supp. 353, 384. A white applicant in Alabama who had never completed the first grade of school was enrolled after the registrar filled out the entire form for him. *United States* v. *Penton,* 212 F. Supp. 193, 210–211.

[13] In Panola County, Mississippi, the registrar required Negroes to interpret the provision of the state constitution concerning "the rate of interest on the fund known as the 'Chickasaw School Fund.'" *United States* v. *Duke,* 332 F. 2d 759, 764. In Forrest County, Mississippi, the registrar rejected six Negroes with baccalaureate degrees, three of whom were also Masters of Arts. *United States* v. *Lynd,* 301 F. 2d 818, 821.

In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination. The Civil Rights Act of 1957[16] authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds. Perfecting amendments in the Civil Rights Act of 1960[17] permitted the joinder of States as parties defendant, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systematic discrimination. Title I of the Civil Rights Act of 1964[18] expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics used to disqualify Negroes from voting in federal elections.

Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination. According to estimates by the Attorney General during hearings on the Act, registration of voting-age Negroes in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964. In each instance, registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration.

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[14] For example, see *United States* v. *Atkins,* 323 F. 2d 733, 743.

[15] For example, see *United States* v. *Logue,* 344 F. 2d 290, 292.

[16] 71 Stat. 634.

[17] 74 Stat. 86.

[18] 78 Stat. 241, 42 U. S. C. § 1971 (1964 ed.).

The previous legislation has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration.[19] Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.[20] The provision of the 1960 law authorizing registration by federal officers has had little impact on local maladministration because of its procedural complexities.

During the hearings and debates on the Act, Selma, Alabama, was repeatedly referred to as the pre-eminent example of the ineffectiveness of existing legislation. In Dallas County, of which Selma is the seat, there were four years of litigation by the Justice Department and two findings by the federal courts of widespread voting discrimination. Yet in those four years, Negro registration rose only from 156 to 383, although there are approximately 15,000 Negroes of voting age in the county. Any possibility that these figures were attributable to political apathy was dispelled by the protest demonstrations in Selma in the early months of 1965. The House Committee on the Judiciary summed up the reaction of Congress to these developments in the following words:

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[19] The Court of Appeals for the Fifth Circuit ordered the registrars of Forrest County, Mississippi, to give future Negro applicants the same assistance which white applicants had enjoyed in the past, and to register future Negro applicants despite errors which were not serious enough to disqualify white applicants in the past. The Mississippi Legislature promptly responded by requiring applicants to complete their registration forms without assistance or error, and by adding a good-morals and public-challenge provision to the registration laws. *United States* v. *Mississippi,* 229 F. Supp. 925, 996–997 (dissenting opinion).

[20] For example, see *United States* v. *Parker,* 236 F. Supp. 511; *United States* v. *Palmer,* 230 F. Supp. 716.

> "The litigation in Dallas County took more than 4 years to open the door to the exercise of constitutional rights conferred almost a century ago. The problem on a national scale is that the difficulties experienced in suits in Dallas County have been encountered over and over again under existing voting laws. Four years is too long. The burden is too heavy—the wrong to our citizens is too serious—the damage to our national conscience is too great not to adopt more effective measures than exist today.
>
> "Such is the essential justification for the pending bill." House Report 11.

II.

The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting.[21] The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant. Section 4 (a)–(d) lays down a formula defining the States and political subdivisions to which these new remedies apply. The first of the remedies, contained in § 4 (a), is the suspension of literacy tests and similar voting qualifications for a period of five years from the last occurrence of substantial voting discrimination. Section 5 prescribes a second remedy, the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination. The third remedy, covered in §§ 6 (b), 7, 9, and 13 (a), is the assignment of federal examiners on certification by the Attorney General to list qualified applicants who are thereafter entitled to vote in all elections.

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[21] For convenient reference, the entire Act is reprinted in an Appendix to this opinion.

Other provisions of the Act prescribe subsidiary cures for persistent voting discrimination. Section 8 authorizes the appointment of federal poll-watchers in places to which federal examiners have already been assigned. Section 10 (d) excuses those made eligible to vote in sections of the country covered by § 4 (b) of the Act from paying accumulated past poll taxes for state and local elections. Section 12 (e) provides for balloting by persons denied access to the polls in areas where federal examiners have been appointed.

The remaining remedial portions of the Act are aimed at voting discrimination in any area of the country where it may occur. Section 2 broadly prohibits the use of voting rules to abridge exercise of the franchise on racial grounds. Sections 3, 6 (a), and 13 (b) strengthen existing procedures for attacking voting discrimination by means of litigation. Section 4 (e) excuses citizens educated in American schools conducted in a foreign language from passing English-language literacy tests. Section 10 (a)–(c) facilitates constitutional litigation challenging the imposition of all poll taxes for state and local elections. Sections 11 and 12 (a)–(d) authorize civil and criminal sanctions against interference with the exercise of rights guaranteed by the Act.

At the outset, we emphasize that only some of the many portions of the Act are properly before us. South Carolina has not challenged §§ 2, 3, 4 (e), 6 (a), 8, 10, 12 (d) and (e), 13 (b), and other miscellaneous provisions having nothing to do with this lawsuit. Judicial review of these sections must await subsequent litigation.[22] In addition, we find that South Carolina's attack on §§ 11 and 12 (a)–(c) is premature. No person has yet been subjected to, or even threatened with, the criminal sanctions which these sections of the Act authorize. See *United States* v. *Raines*, 362 U. S. 17, 20–24. Consequently, the only sections of the Act to be reviewed at this time are §§ 4 (a)–(d), 5, 6 (b), 7, 9, 13 (a), and certain procedural portions of § 14, all of which are presently in actual operation in South Carolina. We turn now to a detailed description of these provisions and their present status.

Coverage formula.

The remedial sections of the Act assailed by South Carolina automatically apply to any State, or to any separate political subdivision such as a county or parish, for which two findings have been made: (1) the Attorney General has determined that on November 1, 1964, it maintained a "test or device," and (2) the Director of the Census has determined that less than 50% of its voting-age residents were registered on November 1, 1964, or voted in the presidential election of November 1964. These findings are not reviewable in any court and are final upon publication in the Federal Register. § 4 (b). As used throughout the Act, the phrase "test or device" means any requirement that a registrant or voter must "(1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." § 4 (c).

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[22] Section 4 (e) has been challenged in *Morgan* v. *Katzenbach*, 247 F. Supp. 196, prob. juris. noted, 382 U. S. 1007, and in *United States* v. *County Bd. of Elections*, 248 F. Supp. 316. Section 10 (a)–(c) is involved in *United States* v. *Texas*, 252 F. Supp. 234, and in *United States* v. *Alabama*, 252 F. Supp. 95; see also *Harper* v. *Virginia State Bd. of Elections*, No. 48, 1965 Term, and *Butts* v. *Harrison*, No. 655, 1965 Term, which were argued together before this Court on January 25 and 26, 1966.

Statutory coverage of a State or political subdivision under § 4 (b) is terminated if the area obtains a declaratory judgment from the District Court for the District of Columbia, determining that tests and devices have not been used during the preceding five years to abridge the franchise on racial grounds. The Attorney General shall consent to entry of the judgment if he has no reason to believe that the facts are otherwise. § 4 (a). For the purposes of this section, tests and devices are not deemed to have been used in a forbidden manner if the incidents of discrimination are few in number and have been promptly corrected, if their continuing effects have been abated, and if they are unlikely to recur in the future. § 4 (d). On the other hand, no area may obtain a declaratory judgment for five years after the final decision of a federal court (other than the denial of a judgment under this section of the Act), determining that discrimination through the use of tests or devices has occurred anywhere in the State or political subdivision. These declaratory judgment actions are to be heard by a three-judge panel, with direct appeal to this Court. § 4 (a).

South Carolina was brought within the coverage formula of the Act on August 7, 1965, pursuant to appropriate administrative determinations which have not been challenged in this proceeding.[23] On the same day, coverage was also extended to Alabama, Alaska, Georgia, Louisiana, Mississippi, Virginia, 26 counties in North Carolina, and one county in Arizona.[24] Two more counties in Arizona, one county in Hawaii, and one county in Idaho were added to the list on November 19, 1965.[25]

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[23] 30 Fed. Reg. 9897.

[24] *Ibid.*

[25] 30 Fed. Reg. 14505.

Thus far Alaska, the three Arizona counties, and the single county in Idaho have asked the District Court for the District of Columbia to grant a declaratory judgment terminating statutory coverage.[26]

Suspension of tests.

In a State or political subdivision covered by § 4 (b) of the Act, no person may be denied the right to vote in any election because of his failure to comply with a "test or device." § 4 (a).

On account of this provision, South Carolina is temporarily barred from enforcing the portion of its voting laws which requires every applicant for registration to show that he:

> "Can both read and write any section of [the State] Constitution submitted to [him] by the registration officer or can show that he owns, and has paid all taxes collectible during the previous year on, property in this State assessed at three hundred dollars or more." S. C. Code Ann. § 23–62 (4) (1965 Supp.).

The Attorney General has determined that the property qualification is inseparable from the literacy test,[27] and South Carolina makes no objection to this finding. Similar tests and devices have been temporarily suspended in the other sections of the country listed above.[28]

Review of new rules.

In a State or political subdivision covered by § 4 (b) of the Act, no person may be denied the right to vote in any election because of his failure to comply with a voting qualification or procedure different from those in force on

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[26] *Alaska* v. *United States*, Civ. Act. 101–66; *Apache County* v. *United States*, Civ. Act. 292–66; *Elmore County* v. *United States*, Civ. Act. 320–66.

[27] 30 Fed. Reg. 14045–14046.

[28] For a chart of the tests and devices in effect at the time the Act was under consideration, see House Hearings 30–32; Senate Report 42–43.

November 1, 1964. This suspension of new rules is terminated, however, under either of the following circumstances: (1) if the area has submitted the rules to the Attorney General, and he has not interposed an objection within 60 days, or (2) if the area has obtained a declaratory judgment from the District Court for the District of Columbia, determining that the rules will not abridge the franchise on racial grounds. These declaratory judgment actions are to be heard by a three-judge panel, with direct appeal to this Court. § 5.

South Carolina altered its voting laws in 1965 to extend the closing hour at polling places from 6 p. m. to 7 p. m.[29] The State has not sought judicial review of this change in the District Court for the District of Columbia, nor has it submitted the new rule to the Attorney General for his scrutiny, although at our hearing the Attorney General announced that he does not challenge the amendment. There are indications in the record that other sections of the country listed above have also altered their voting laws since November 1, 1964.[30]

Federal examiners.

In any political subdivision covered by § 4 (b) of the Act, the Civil Service Commission shall appoint voting examiners whenever the Attorney General certifies either of the following facts: (1) that he has received meritorious written complaints from at least 20 residents alleging that they have been disenfranchised under color of law because of their race, or (2) that the appointment of examiners is otherwise necessary to effectuate the guarantees of the Fifteenth Amendment. In making the latter determination, the Attorney General must consider, among other factors, whether the registration ratio of non-whites to whites seems reasonably attributable to racial discrimination, or whether there is substantial evidence of good-faith efforts to comply with the Fifteenth Amendment. § 6 (b). These certifications are not reviewable in any court and are effective upon publication in the Federal Register. § 4 (b).

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[29] S. C. Code Ann. § 23-342 (1965 Supp.).

[30] Brief for Mississippi as *amicus curiae*, App.

The examiners who have been appointed are to test the voting qualifications of applicants according to regulations of the Civil Service Commission prescribing times, places, procedures, and forms. §§ 7 (a) and 9 (b). Any person who meets the voting requirements of state law, insofar as these have not been suspended by the Act, must promptly be placed on a list of eligible voters. Examiners are to transmit their lists at least once a month to the appropriate state or local officials, who in turn are required to place the listed names on the official voting rolls. Any person listed by an examiner is entitled to vote in all elections held more than 45 days after his name has been transmitted. § 7 (b).

A person shall be removed from the voting list by an examiner if he has lost his eligibility under valid state law, or if he has been successfully challenged through the procedure prescribed in § 9 (a) of the Act. § 7 (d). The challenge must be filed at the office within the State designated by the Civil Service Commission; must be submitted within 10 days after the listing is made available for public inspection; must be supported by the affidavits of at least two people having personal knowledge of the relevant facts; and must be served on the person challenged by mail or at his residence. A hearing officer appointed by the Civil Service Commission shall hear the challenge and render a decision within 15 days after the challenge is filed. A petition for review of the hearing officer's decision must be submitted within an additional 15 days after service of the decision on the person seeking review. The court of appeals for the circuit in which the person challenged resides is to hear the petition and affirm the hearing officer's decision unless it is clearly erroneous. Any person listed by an examiner is entitled to vote pending a final decision of the hearing officer or the court. § 9 (a).

The listing procedures in a political subdivision are terminated under either of the following circumstances: (1) if the Attorney General informs the Civil Service Commission that all persons listed by examiners have been placed on the official voting rolls, and that there is no longer reasonable cause to fear abridgment of the franchise on racial grounds, or (2) if the political subdivision has obtained a declaratory judgment from the District Court for the District of Columbia, ascertaining the same facts which govern termination by the Attorney General, and the Director of the Census has determined that more than 50% of the non-white residents of voting age are registered to vote. A political subdivision may petition the Attorney General to terminate listing procedures or to authorize the necessary census, and the District Court itself shall request the census if the Attorney General's refusal to do so is arbitrary or unreasonable. § 13 (a). The determinations by the Director of the Census are not reviewable in any court and are final upon publication in the Federal Register. § 4 (b).

On October 30, 1965, the Attorney General certified the need for federal examiners in two South Carolina counties,[31] and examiners appointed by the Civil Service Commission have been serving there since November 8, 1965. Examiners have also been assigned to 11 counties in Alabama, five parishes in Louisiana, and 19 counties in Mississippi.[32] The examiners are listing people found eligible to vote, and the challenge procedure has been employed extensively.[33] No political subdivision has yet sought to have federal examiners withdrawn through the Attorney General or the District Court for the District of Columbia.

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[31] 30 Fed. Reg. 13850.

[32] 30 Fed. Reg. 9970–9971, 10863, 12363, 12654, 13849–13850, 15837; 31 Fed. Reg. 914.

III.

These provisions of the Voting Rights Act of 1965 are challenged on the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution. South Carolina and certain of the *amici curiae* also attack specific sections of the Act for more particular reasons. They argue that the coverage formula prescribed in § 4 (a)–(d) violates the principle of the equality of States, denies due process by employing an invalid presumption and by barring judicial review of administrative findings, constitutes a forbidden bill of attainder, and impairs the separation of powers by adjudicating guilt through legislation. They claim that the review of new voting rules required in § 5 infringes Article III by directing the District Court to issue advisory opinions. They contend that the assignment of federal examiners authorized in § 6 (b) abridges due process by precluding judicial review of administrative findings and impairs the separation of powers by giving the Attorney General judicial functions; also that the challenge procedure prescribed in § 9 denies due process on account of its speed. Finally, South Carolina and certain of the *amici curiae* maintain that §§ 4 (a) and 5, buttressed by § 14 (b) of the Act, abridge due process by limiting litigation to a distant forum.

Some of these contentions may be dismissed at the outset. The word "person" in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court. See *International Shoe Co.* v. *Cocreham,* 246 La. 244, 266, 164 So. 2d 314, 322, n. 5; cf. *United States* v. *City of Jackson,* 318 F. 2d 1, 8 (C. A. 5th Cir.). Likewise, courts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt. See *United States* v. *Brown,* 381 U. S. 437; *Ex parte Garland,* 4 Wall. 333. Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen. *Massachusetts* v. *Mellon,* 262 U. S. 447, 485–486; *Florida* v. *Mellon,* 273 U. S. 12, 18. The objections to the Act which are raised under these provisions may therefore be considered only as additional aspects of the basic question presented by the case: Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?

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[33] See Comm'n on Civil Rights, The Voting Rights Act (1965).

The ground rules for resolving this question are clear. The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. Cf. our rulings last Term, sustaining Title II of the Civil Rights Act of 1964, in *Heart of Atlanta Motel* v. *United States,* 379 U. S. 241, 258–259, 261–262; and *Katzenbach* v. *McClung,* 379 U. S. 294, 303–304. We turn now to a more detailed description of the standards which govern our review of the Act.

Section 1 of the Fifteenth Amendment declares that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." This declaration has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice. See *Neal* v. *Delaware,* 103 U. S. 370; *Guinn* v. *United States,* 238 U. S. 347; *Myers* v. *Anderson,* 238 U. S. 368; *Lane* v. *Wilson,* 307 U. S. 268; *Smith* v. *Allwright,* 321 U. S. 649; *Schnell* v. *Davis,* 336 U. S. 933; *Terry* v. *Adams,* 345 U. S. 461; *United States* v. *Thomas,* 362 U. S. 58; *Gomillion* v. *Lightfoot,* 364 U. S. 339; *Alabama* v. *United States,* 371 U. S. 37; *Louisiana* v. *United States,* 380 U. S. 145. These decisions have been rendered with full respect for the general rule, reiterated last Term in *Carrington* v. *Rash,* 380 U. S. 89, 91, that States "have broad powers to determine the conditions under which the right of suffrage may be exercised." The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power. "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." *Gomillion* v. *Lightfoot,* 364 U. S., at 347.

South Carolina contends that the cases cited above are precedents only for the authority of the judiciary to strike down state statutes and procedures—that to allow an exercise of this authority by Congress would be to rob the courts of their rightful constitutional role. On the contrary, § 2 of the Fifteenth Amendment expressly declares that "Congress shall have power to enforce this article by appropriate legislation." By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1. "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective." *Ex parte Virginia,* 100 U. S. 339, 345. Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.

Congress has repeatedly exercised these powers in the past, and its enactments have repeatedly been upheld. For recent examples, see the Civil Rights Act of 1957, which was sustained in *United States* v. *Raines,* 362 U. S. 17; *United States* v. *Thomas, supra;* and *Hannah* v. *Larche,* 363 U. S. 420; and the Civil Rights Act of 1960, which was upheld in *Alabama* v. *United States, supra; Louisiana* v. *United States, supra;* and *United States* v. *Mississippi,* 380 U. S. 128. On the rare occasions when the Court has found an unconstitutional exercise of these powers, in its opinion Congress had attacked evils not comprehended by the Fifteenth Amendment. See *United States* v. *Reese,* 92 U. S. 214; *James* v. *Bowman,* 190 U. S. 127.

The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch* v. *Maryland,* 4 Wheat. 316, 421.

The Court has subsequently echoed his language in describing each of the Civil War Amendments:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." *Ex parte Virginia,* 100 U. S., at 345–346.

This language was again employed, nearly 50 years later, with reference to Congress' related authority under § 2 of the Eighteenth Amendment. *James Everard's Breweries* v. *Day,* 265 U. S. 545, 558–559.

We therefore reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment. In the oft-repeated words of Chief Justice Marshall, referring to another specific legislative authorization in the Constitution, "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden,* 9 Wheat. 1, 196.

IV.

Congress exercised its authority under the Fifteenth Amendment in an inventive manner when it enacted the Voting Rights Act of 1965. First: The measure prescribes remedies for voting discrimination which go into effect without any need for prior adjudication. This was clearly a legitimate response to the problem, for which there is ample precedent under other constitutional provisions. See *Katzenbach* v. *McClung*, 379 U. S. 294, 302–304; *United States* v. *Darby*, 312 U. S. 100, 120–121. Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits.[34] After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims. The question remains, of course, whether the specific remedies prescribed in the Act were an appropriate means of combatting the evil, and to this question we shall presently address ourselves.

Second: The Act intentionally confines these remedies to a small number of States and political subdivisions which in most instances were familiar to Congress by name.[35] This, too, was a permissible method of dealing with the problem. Congress had learned that substantial voting discrimination presently occurs in certain sections of the country, and it knew no way of accurately forecasting whether the evil might spread elsewhere in the future.[36] In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. See *McGowan* v. *Maryland*, 366 U. S. 420, 427; *Salsburg* v. *Maryland*, 346 U. S. 545, 550–554. The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared. See *Coyle* v. *Smith*, 221 U. S. 559, and cases cited therein.

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[34] House Report 9–11; Senate Report 6–9.

[35] House Report 13; Senate Report 52, 55.

[36] House Hearings 27; Senate Hearings 201.

Coverage formula.

We now consider the related question of whether the specific States and political subdivisions within § 4 (b) of the Act were an appropriate target for the new remedies. South Carolina contends that the coverage formula is awkwardly designed in a number of respects and that it disregards various local conditions which have nothing to do with racial discrimination. These arguments, however, are largely beside the point.[37] Congress began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act. The formula eventually evolved to describe these areas was relevant to the problem of voting discrimination, and Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by § 4 (b) of the Act. No more was required to justify the application to these areas of Congress' express powers under the Fifteenth Amendment. Cf. *North American Co.* v. *S. E. C.*, 327 U. S. 686, 710–711; *Assigned Car Cases*, 274 U. S. 564, 582–583.

To be specific, the new remedies of the Act are imposed on three States—Alabama, Louisiana, and Mississippi—in which federal courts have repeatedly found substantial voting discrimination.[38] Section 4 (b) of the Act also embraces two other States—Georgia and South Carolina—plus large portions of a third State—North Carolina—for which there was more fragmentary evidence of recent voting discrimination mainly adduced by the Justice Department and the Civil Rights Commission.[39] All of these areas were appropriately subjected to the new remedies. In identifying past evils, Congress obviously may avail itself of information from any probative source. See *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241, 252–253; *Katzenbach* v. *McClung*, 379 U. S., at 299–301.

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[37] For Congress' defense of the formula, see House Report 13–14; Senate Report 13–14.

[38] House Report 12; Senate Report 9–10.

The areas listed above, for which there was evidence of actual voting discrimination, share two characteristics incorporated by Congress into the coverage formula: the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average. Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters. Accordingly, the coverage formula is rational in both practice and theory. It was therefore permissible to impose the new remedies on the few remaining States and political subdivisions covered by the formula, at least in the absence of proof that they have been free of substantial voting discrimination in recent years. Congress is clearly not bound by the rules relating to statutory presumptions in criminal cases when it prescribes civil remedies against other organs of government under § 2 of the Fifteenth Amendment. Compare *United States* v. *Romano*, 382 U. S. 136; *Tot* v. *United States*, 319 U. S. 463.

It is irrelevant that the coverage formula excludes certain localities which do not employ voting tests and devices but for which there is evidence of voting discrimination by other means. Congress had learned that widespread and persistent discrimination in voting during recent years has typically entailed the misuse of tests and devices, and this was the evil for which the new remedies were specifically designed.[40] At the same time, through §§ 3, 6 (a), and 13 (b) of the Act, Congress strengthened existing remedies for voting discrimination in other areas of the country. Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience. See *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488–489; *Railway Express Agency* v. *New York*, 336 U. S. 106. There are no States or political subdivisions exempted from coverage under § 4 (b) in which the record reveals recent racial discrimination involving tests and devices. This fact confirms the rationality of the formula.

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[39] Georgia: House Hearings 160–176; Senate Hearings 1182–1184, 1237, 1253, 1300–1301, 1336–1345. North Carolina: Senate Hearings 27–28, 39, 246–248. South Carolina: House Hearings 114–116, 196–201; Senate Hearings 1353–1354.

Acknowledging the possibility of overbreadth, the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years. Despite South Carolina's argument to the contrary, Congress might appropriately limit litigation under this provision to a single court in the District of Columbia, pursuant to its constitutional power under Art. III, § 1, to "ordain and establish" inferior federal tribunals. See *Bowles* v. *Willingham*, 321 U. S. 503, 510–512; *Yakus* v. *United States*, 321 U. S. 414, 427–431; *Lockerty* v. *Phillips*, 319 U. S. 182. At the present time, contractual claims against the United States for more than $10,000 must be brought in the Court of Claims, and, until 1962, the District of Columbia was the sole venue of suits against federal officers officially residing in the Nation's Capital.[41] We have discovered no suggestion that Congress exceeded constitutional bounds in imposing these limitations on litigation against the Federal Government, and the Act is no less reasonable in this respect.

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[40] House Hearings 75–77; Senate Hearings 241–243.

South Carolina contends that these termination procedures are a nullity because they impose an impossible burden of proof upon States and political subdivisions entitled to relief. As the Attorney General pointed out during hearings on the Act, however, an area need do no more than submit affidavits from voting officials, asserting that they have not been guilty of racial discrimination through the use of tests and devices during the past five years, and then refute whatever evidence to the contrary may be adduced by the Federal Government.[42] Section 4 (d) further assures that an area need not disprove each isolated instance of voting discrimination in order to obtain relief in the termination proceedings. The burden of proof is therefore quite bearable, particularly since the relevant facts relating to the conduct of voting officials are peculiarly within the knowledge of the States and political subdivisions themselves. See *United States* v. *New York, N. H. & H. R. Co.*, 355 U. S. 253, 256, n. 5; cf. *S. E. C.* v. *Ralston Purina Co.*, 346 U. S. 119, 126.

The Act bars direct judicial review of the findings by the Attorney General and the Director of the Census which trigger application of the coverage formula. We reject the claim by Alabama as *amicus curiae* that this provision is invalid because it allows the new remedies of the Act to be imposed in an arbitrary way. The Court has already permitted Congress to withdraw judicial review of administrative determinations in numerous cases involving the statutory rights of private parties. For example, see *United States* v. *California Eastern Line*, 348 U. S. 351; *Switchmen's Union* v. *National Mediation Bd.*, 320 U. S. 297. In this instance, the findings not subject to review consist of objective statistical determinations by the Census Bureau and a routine analysis of state statutes by the Justice Department. These functions are unlikely to arouse any plausible dispute, as South Carolina apparently concedes. In the event that the formula is improperly applied, the area affected can always go into court and obtain termination of coverage under § 4 (b), provided of course that it has not been guilty of voting discrimination in recent years. This procedure serves as a partial substitute for direct judicial review.

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[41] Regarding claims against the United States, see 28 U. S. C. §§ 1491, 1346 (a) (1964 ed.). Concerning suits against federal officers, see *Stroud* v. *Benson*, 254 F. 2d 448; H. R. Rep. No. 536, 87th Cong., 1st Sess.; S. Rep. No. 1992, 87th Cong., 2d Sess.; 28 U. S. C. § 1391 (e) (1964 ed.); 2 Moore, Federal Practice ¶ 4.29 (1964 ed.).

[42] House Hearings 92–93; Senate Hearings 26–27.

Suspension of tests.

We now arrive at consideration of the specific remedies prescribed by the Act for areas included within the coverage formula. South Carolina assails the temporary suspension of existing voting qualifications, reciting the rule laid down by *Lassiter* v. *Northampton County Bd. of Elections*, 360 U. S. 45, that literacy tests and related devices are not in themselves contrary to the Fifteenth Amendment. In that very case, however, the Court went on to say, "Of course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot." *Id.*, at 53. The record shows that in most of the States covered by the Act, including South Carolina, various tests and devices have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years.[43] Under these circumstances, the Fifteenth Amendment has clearly been violated. See *Louisiana* v. *United States,* 380 U. S. 145; *Alabama* v. *United States,* 371 U. S. 37; *Schnell* v. *Davis,* 336 U. S. 933.

The Act suspends literacy tests and similar devices for a period of five years from the last occurrence of substantial voting discrimination. This was a legitimate response to the problem, for which there is ample precedent in Fifteenth Amendment cases. *Ibid.* Underlying the response was the feeling that States and political subdivisions which had been allowing white illiterates to vote for years could not sincerely complain about "dilution" of their electorates through the registration of Negro illiterates.[44] Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants.[45] Congress permissibly rejected the alternative of requiring a complete re-registration of all voters, believing that this would be too harsh on many whites who had enjoyed the franchise for their entire adult lives.[46]

Review of new rules.

The Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment. This may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate. See *Home*

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[43] House Report 11-13; Senate Report 4-5, 9-12.

[44] House Report 15; Senate Report 15-16.

[45] House Report 15; Senate Report 16.

[46] House Hearings 17; Senate Hearings 22-23.

Bldg. & Loan Assn. v. *Blaisdell,* 290 U. S. 398; *Wilson* v. *New,* 243 U. S. 332. Congress knew that some of the States covered by § 4 (b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.[47] Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.

For reasons already stated, there was nothing inappropriate about limiting litigation under this provision to the District Court for the District of Columbia, and in putting the burden of proof on the areas seeking relief. Nor has Congress authorized the District Court to issue advisory opinions, in violation of the principles of Article III invoked by Georgia as *amicus curiae.* The Act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension. A State or political subdivision wishing to make use of a recent amendment to its voting laws therefore has a concrete and immediate "controversy" with the Federal Government. Cf. *Public Utilities Comm'n* v. *United States,* 355 U. S. 534, 536–539; *United States* v. *California,* 332 U. S. 19, 24–25. An appropriate remedy is a judicial determination that continued suspension of the new rule is unnecessary to vindicate rights guaranteed by the Fifteenth Amendment.

Federal examiners.

The Act authorizes the appointment of federal examiners to list qualified applicants who are thereafter entitled to vote, subject to an expeditious challenge procedure. This was clearly an appropriate response to the problem, closely related to remedies authorized in prior cases. See *Alabama* v. *United States, supra; United States* v. *Thomas,* 362 U. S. 58. In many of the political subdivisions covered by § 4 (b) of the Act, voting officials have persistently employed a variety of procedural tactics to deny Negroes the franchise, often in direct defiance or evasion of federal court decrees.[48] Congress realized that merely to suspend voting rules which have been misused or are subject to misuse might leave this localized evil undisturbed. As for the briskness of the challenge procedure, Congress knew that in some of the areas affected, challenges had been persistently employed to harass registered Negroes. It chose to forestall this abuse, at the same time providing alternative ways for removing persons listed through error or fraud.[49] In addition to the judicial challenge procedure, § 7 (d) allows for the removal of names by the examiner himself, and § 11 (c) makes it a crime to obtain a listing through fraud.

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[47] House Report 10–11; Senate Report 8, 12.

In recognition of the fact that there were political subdivisions covered by § 4 (b) of the Act in which the appointment of federal examiners might be unnecessary, Congress assigned the Attorney General the task of determining the localities to which examiners should be sent.[50] There is no warrant for the claim, asserted by Georgia as *amicus curiae,* that the Attorney General is free to use this power in an arbitrary fashion, without regard to the purposes of the Act. Section 6 (b) sets adequate standards to guide the exercise of his discretion, by directing him to calculate the registration ratio of nonwhites to whites, and to weigh evidence of good-faith efforts to avoid possible voting discrimination. At the same time, the special termination procedures of § 13 (a) provide indirect judicial review for the political subdivisions affected, assuring the withdrawal of federal examiners from areas where they are clearly not needed. Cf. *Carlson* v. *Landon,* 342 U. S. 524, 542–544; *Mulford* v. *Smith,* 307 U. S. 38, 48–49.

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[48] House Report 16; Senate Report 15.

[49] Senate Hearings 200.

[50] House Report 16.

After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively. Many of the areas directly affected by this development have indicated their willingness to abide by any restraints legitimately imposed upon them.[51] We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteeenth Amendment. Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live. We may finally look forward to the day when truly "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

The bill of complaint is *Dismissed.*

APPENDIX TO OPINION OF THE COURT.

VOTING RIGHTS ACT OF 1965.

AN ACT

To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

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[51] See Comm'n on Civil Rights, The Voting Rights Act (1965).

assembled, That this Act shall be known as the "Voting Rights Act of 1965."

SEC. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

SEC. 3. (a) Whenever the Attorney General institutes a proceeding under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal examiners by the United States Civil Service Commission in accordance with section 6 to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the guarantees of the fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such examiners is necessary to enforce such guarantees or (2) as part of any final judgment if the court finds that violations of the fifteenth amendment justifying equitable relief have occurred in such State or subdivision: *Provided,* That the court need not authorize the appointment of examiners if any incidents of denial or abridgement of the right to vote on account of race or color (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(b) If in a proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that a test or device has been used for the purpose or with the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color, it shall suspend the use of tests and devices in such State or political subdivisions as the court shall determine is appropriate and for such period as it deems necessary.

(c) If in any proceeding instituted by the Attorney General under any statute to enforce the guarantees of the fifteenth amendment in any State or political subdivision the court finds that violations of the fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

SEC. 4. (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

SEC. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4 (a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

SEC. 6. Whenever (a) a court has authorized the appointment of examiners pursuant to the provisions of section 3 (a), or (b) unless a declaratory judgment has been rendered under section 4 (a), the Attorney General certifies with respect to any political subdivision named in, or included within the scope of, determinations made under section 4 (b) that (1) he has received complaints in writing from twenty or more residents of such political subdivision alleging that they have been denied the right to vote under color of law on account of race or color, and that he believes such complaints to be meritorious, or (2) that in his judgment (considering, among other factors, whether the ratio of nonwhite persons to white persons registered to vote within such subdivision appears to him to be reasonably attributable to violations of the fifteenth amendment or whether substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the fifteenth amendment), the appointment of examiners is otherwise necessary to enforce the guarantees of the fifteenth amendment, the Civil Service Commission shall appoint as many examiners for such subdivision as it may deem appropriate to prepare and maintain lists of persons eligible to vote in Federal, State, and local elections. Such examiners, hearing officers provided for in section 9 (a), and other persons deemed necessary by the Commission to carry out the provisions and purposes of this Act shall be appointed, compensated, and separated without regard to the provisions of any statute administered by the Civil Service Commission, and service under this Act shall not be considered employment for the purposes of any statute administered by the Civil Service Commission, except the provisions of section 9 of the Act of August 2, 1939, as amended (5 U. S. C. 118i), prohibiting partisan political activity: *Provided,* That the Commission is authorized, after consulting the head of the appropriate department or agency, to designate suitable persons in the official service of the United States, with their consent, to serve in these positions. Examiners and hearing officers shall have the power to administer oaths.

SEC. 7. (a) The examiners for each political subdivision shall, at such places as the Civil Service Commission shall by regulation designate, examine applicants concerning their qualifications for voting. An application to an examiner shall be in such form as the Commission may require and shall contain allegations that the applicant is not otherwise registered to vote.

(b) Any person whom the examiner finds, in accordance with instructions received under section 9 (b), to have the qualifications prescribed by State law not inconsistent with the Constitution and laws of the United States shall promptly be placed on a list of eligible voters. A challenge to such listing may be made in accordance with section 9 (a) and shall not be the basis for a prosecution under section 12 of this Act. The examiner shall certify and transmit such list, and any supplements as appropriate, at least once a month, to the offices of the appropriate election officials, with copies to the Attorney General and the attorney general of the State, and any such lists and supplements thereto transmitted during the month shall be available for public inspection on the last business day of the month and in any event not later than the forty-fifth day prior to any election. The appropriate State or local election official shall place such names on the official voting list. Any person whose name appears on the examiner's list shall be entitled and allowed to vote in the election district of his residence unless and until the appropriate election officials shall have been notified that such person has been removed from such list in accordance with subsection (d): *Provided,* That no person shall be entitled to vote in any election by virtue of this Act unless his name shall have been certified and transmitted on such a list to the offices of the appropriate election officials at least forty-five days prior to such election.

(c) The examiner shall issue to each person whose name appears on such a list a certificate evidencing his eligibility to vote.

(d) A person whose name appears on such a list shall be removed therefrom by an examiner if (1) such person has been successfully challenged in accordance with the procedure prescribed in section 9, or (2) he has been determined by an examiner to have lost his eligibility to vote under State law not inconsistent with the Constitution and the laws of the United States.

Sec. 8. Whenever an examiner is serving under this Act in any political subdivision, the Civil Service Commission may assign, at the request of the Attorney General, one or more persons, who may be officers of the United States, (1) to enter and attend at any place for holding an election in such subdivision for the purpose of observing whether persons who are entitled to vote are being permitted to vote, and (2) to enter and attend at any place for tabulating the votes cast at any election held in such subdivision for the purpose of observing whether votes cast by persons entitled to vote are being properly tabulated. Such persons so assigned shall report to an examiner appointed for such political subdivision, to the Attorney General, and if the appointment of examiners has been authorized pursuant to section 3 (a), to the court.

SEC. 9. (a) Any challenge to a listing on an eligibility list prepared by an examiner shall be heard and determined by a hearing officer appointed by and responsible to the Civil Service Commission and under such rules as the Commission shall by regulation prescribe. Such challenge shall be entertained only if filed at such office within the State as the Civil Service Commission shall by regulation designate, and within ten days after the listing of the challenged person is made available for public inspection, and if supported by (1) the affidavits of at least two persons having personal knowledge of the facts constituting grounds for the challenge, and (2) a certification that a copy of the challenge and affidavits have been served by mail or in person upon the person challenged at his place of residence set out in the application. Such challenge shall be determined within fifteen days after it has been filed. A petition for review of the decision of the hearing officer may be filed in the United States court of appeals for the circuit in which the person challenged resides within fifteen days after service of such decision by mail on the person petitioning for review but no decision of a hearing officer shall be reversed unless clearly erroneous. Any person listed shall be entitled and allowed to vote pending final determination by the hearing officer and by the court.

(b) The times, places, procedures, and form for application and listing pursuant to this Act and removals from the eligibility lists shall be prescribed by regulations promulgated by the Civil Service Commission and the Commision shall, after consultation with the Attorney General, instruct examiners concerning applicable State law not inconsistent with the Constitution and laws of the United States with respect to (1) the qualifications required for listing, and (2) loss of eligibility to vote.

(c) Upon the request of the applicant or the challenger or on its own motion the Civil Service Commission shall have the power to require by subpena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter pending before it under the authority of this section. In case of contumacy or refusal to obey a subpena, any district court of the United States or the United States court of any territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or is domiciled or transacts business, or has appointed an agent for receipt of service of process, upon application by the Attorney General of the United States shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission or a hearing officer, there to produce pertinent, relevant, and nonprivileged documentary evidence if so ordered, or there to give testimony touching the matter under investigation; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

SEC. 10. (a) The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.

(b) In the exercise of the powers of Congress under section 5 of the fourteenth amendment and section 2 of the fifteenth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purposes of this section.

(c) The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

(d) During the pendency of such actions, and thereafter if the courts, notwithstanding this action by the Congress, should declare the requirement of the payment of a poll tax to be constitutional, no citizen of the United States who is a resident of a State or political subdivision with respect to which determinations have been made under subsection 4 (b) and a declaratory judgment has not been entered under subsection 4 (a), during the first year he becomes otherwise entitled to vote by reason of registration by State or local officials or listing by an examiner, shall be denied the right to vote for failure to pay a poll tax if he tenders payment of such tax for the current year to an examiner or to the appropriate State or local official at least forty-five days prior to election, whether or not such tender would be timely or adequate under State law. An examiner shall have authority to accept such payment from any person authorized by this Act to make an application for listing, and shall issue a receipt for such payment. The examiner shall transmit promptly any such poll tax payment to the office of the State or local official authorized to receive such payment under State law, together with the name and address of the applicant.

SEC. 11. (a) No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this Act or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3 (a), 6, 8, 9, 10, or 12 (e).

(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, or Delegates or Commissioners from the territories or possessions, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

SEC. 12. (a) Whoever shall deprive or attempt to deprive any person of any right secured by section 2, 3, 4, 5, 7, or 10 or shall violate section 11 (a) or (b), shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) Whoever, within a year following an election in a political subdivision in which an examiner has been appointed (1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or (2) alters any official record of voting in such election tabulated from a voting machine or otherwise, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(c) Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interferes with any right secured by section 2, 3, 4, 5, 7, 10, or 11 (a) or (b) shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(d) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2, 3, 4, 5, 7, 10, 11, or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes.

(e) Whenever in any political subdivision in which there are examiners appointed pursuant to this Act any persons allege to such an examiner within forty-eight hours after the closing of the polls that notwithstanding (1) their listing under this Act or registration by an appropriate election official and (2) their eligibilty to vote, they have not been permitted to vote in such election, the examiner shall forthwith notify the Attorney General if such allegations in his opinion appear to be well founded. Upon receipt of such notification, the Attorney General may forthwith file with the district court an application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The district court shall hear and determine such matters immediately after the filing of such application. The remedy provided in this subsection shall not preclude any remedy available under State or Federal law.

(f) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

SEC. 13. Listing procedures shall be terminated in any political subdivision of any State (a) with respect to examiners appointed pursuant to clause (b) of section 6 whenever the Attorney General notifies the Civil Service Commission, or whenever the District Court for the District of Columbia determines in an action for declaratory judgment brought by any political subdivision with respect to which the Director of the Census has determined that more than 50 per centum of the nonwhite persons of voting age residing therein are registered to vote, (1) that all persons listed by an examiner for such subdivision have been placed on the appropriate voting registration roll, and (2) that there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color in such subdivision, and (b), with respect to examiners appointed pursuant to section 3 (a), upon order of the authorizing court. A political subdivision may petition the Attorney General for the termination of listing procedures under clause (a) of this section, and may petition the Attorney General to request the Director of the Census to take such survey or census as may be appropriate for the making of the determination provided for in this section. The District Court for the District of Columbia shall have jurisdiction to require such survey or census to be made by the Director of the Census and it shall require him to do so if it deems the Attorney

General's refusal to request such survey or census to be arbitrary or unreasonable.

SEC. 14. (a) All cases of criminal contempt arising under the provisions of this Act shall be governed by section 151 of the Civil Rights Act of 1957 (42 U. S. C. 1995).

(b) No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

(c) (1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(d) In any action for a declaratory judgment brought pursuant to section 4 or section 5 of this Act, subpenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: *Provided,* That no writ of subpena shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

SEC. 15. Section 2004 of the Revised Statutes (42 U. S. C. 1971), as amended by section 131 of the Civil Rights Act of 1957 (71 Stat. 637), and amended by section 601 of the Civil Rights Act of 1960 (74 Stat. 90), and as further amended by section 101 of the Civil Rights Act of 1964 (78 Stat. 241), is further amended as follows:

(a) Delete the word "Federal" wherever it appears in subsections (a) and (c);

(b) Repeal subsection (f) and designate the present subsections (g) and (h) as (f) and (g), respectively.

SEC. 16. The Attorney General and the Secretary of Defense, jointly, shall make a full and complete study to determine whether, under the laws or practices of any State or States, there are preconditions to voting, which might tend to result in discrimination against citizens serving in the Armed Forces of the United States seeking to vote. Such officials shall, jointly, make a report to the Congress not later than June 30, 1966, containing the results of such study, together with a list of any States in which such preconditions exist, and shall include in such report such recommendations for legislation as they deem advisable to prevent discrimination in voting against citizens serving in the Armed Forces of the United States.

SEC. 17. Nothing in this Act shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.

SEC. 18. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

SEC. 19. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

Approved August 6, 1965.

MR. JUSTICE BLACK, concurring and dissenting.

I agree with substantially all of the Court's opinion sustaining the power of Congress under § 2 of the Fifteenth Amendment to suspend state literacy tests and similar voting qualifications and to authorize the Attorney General to secure the appointment of federal examiners to register qualified voters in various sections of the country. Section 1 of the Fifteenth Amendment provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." In addition to this unequivocal command to the States and the Federal Government that no citizen shall have his right to vote denied or abridged because of race or color, § 2 of the Amendment unmistakably gives Congress specific power to go further and pass appropriate legislation to protect this right to vote against any method of abridgment no matter how subtle. Compare my dissenting opinion in *Bell* v. *Maryland,* 378 U. S. 226, 318. I have no doubt whatever as to the power of Congress under § 2 to enact the provisions of the Voting Rights Act of 1965 dealing with the suspension of state voting tests that have been used as notorious means to deny and abridge voting rights on racial grounds. This same congressional power necessarily exists to authorize appointment of federal examiners. I also agree with the judgment of the Court upholding § 4 (b) of the Act which sets out a formula for determining when and where the major remedial sections of the Act take effect. I reach this conclusion, however, for a somewhat different reason than that stated by the Court, which is that "the coverage formula is rational in both practice and theory." I do not base my conclusion on the fact that the formula is rational, for it is enough for me that Congress by creating this formula has merely exercised its hitherto unquestioned and undisputed power to decide when, where, and upon what conditions its laws shall go into effect. By stating in specific detail that the major remedial sections of the Act are to be applied in areas where certain conditions exist, and by granting the Attorney General and the Director of the Census unreviewable power to make the mechanical determination of which areas come within the formula of § 4 (b), I believe that Congress has acted within its established power to set out preconditions upon which the Act is to go into effect. See, *e. g., Martin* v. *Mott,* 12 Wheat. 19; *United States* v. *Bush & Co.,* 310 U. S. 371; *Hirabayashi* v. *United States,* 320 U. S. 81.

Though, as I have said, I agree with most of the Court's conclusions, I dissent from its holding that every part of § 5 of the Act is constitutional. Section 4 (a), to which § 5 is linked, suspends for five years all literacy tests and similar devices in those States coming within the formula of § 4 (b). Section 5 goes on to provide that a State covered by § 4 (b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color. I think this section is unconstitutional on at least two grounds.

(a) The Constitution gives federal courts jurisdiction over cases and controversies only. If it can be said that any case or controversy arises under this section which gives the District Court for the District of Columbia jurisdiction to approve or reject state laws or constitutional amendments, then the case or controversy must be between a State and the United States Government. But it is hard for me to believe that a justiciable controversy can arise in the constitutional sense from a desire by the United States Government or some of its officials to determine in advance what legislative provisions a State may enact or what constitutional amendments it may adopt. If this dispute between the Federal Government and the States amounts to a case or controversy it is a far cry from the traditional constitutional notion of a case or controversy as a dispute over the meaning of enforceable laws or the manner in which they are applied. And if by this section Congress has created a case or controversy, and I do not believe it has, then it seems to me that the most appropriate judicial forum for settling these important questions is this Court acting under its original Art. III, § 2, jurisdiction to try cases in which a State is a party.[1] At least a trial in this Court would treat the States with the dignity to which they should be entitled as constituent members of our Federal Union.

The form of words and the manipulation of presumptions used in § 5 to create the illusion of a case or controversy should not be allowed to cloud the effect of that section. By requiring a State to ask a federal court to approve the validity of a proposed law which has in no way become operative, Congress has asked the State to secure precisely the type of advisory opinion our Constitution forbids. As I have pointed out elsewhere, see my dissenting opinion in *Griswold* v. *Connecticut,* 381 U. S. 479, 507, n. 6, pp. 513–515, some of those drafting our Constitution wanted to give the federal courts the power to issue advisory opinions and propose new laws to the legislative body. These suggestions were rejected. We should likewise reject any attempt by Congress to flout constitutional limitations by authorizing federal courts to render advisory opinions when there is no case or controversy before them. Congress has ample power to protect the rights of citizens to vote without resorting to the unnecessarily circuitous, indirect and unconstitutional route it has adopted in this section.

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[1] If § 14 (b) of the Act by stating that no court other than the District Court for the District of Columbia shall issue a judgment under § 5 is an attempt to limit the constitutionally created original jurisdiction of this Court, then I think that section is also unconstitutional.

(b) My second and more basic objection to § 5 is that Congress has here exercised its power under § 2 of the Fifteenth Amendment through the adoption of means that conflict with the most basic principles of the Constitution. As the Court says the limitations of the power granted under § 2 are the same as the limitations imposed on the exercise of any of the powers expressly granted Congress by the Constitution. The classic formulation of these constitutional limitations was stated by Chief Justice Marshall when he said in *McCulloch* v. *Maryland,* 4 Wheat. 316, 421, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consist with the letter and spirit of the constitution,* are constitutional." (Emphasis added.) Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless. One of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either "to the States respectively, or to the people."[1] Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them.[2] Moreover, it seems to me that § 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that "The United States shall guarantee to every State in this Union a Republican Form of Government." I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces. And if one law concerning voting can make the States plead for this approval by a distant federal court or the United States Attorney General, other laws on different subjects can force the States to seek the advance approval not only of the Attorney General but of the President himself or any other chosen members of his staff. It is inconceivable to me that such a radical degradation of state power was intended in any of the provisions of our Constitution or its Amendments. Of course I do not mean to cast any doubt whatever upon the indisputable power of the Federal Government to invalidate a state law once enacted and operative on the ground that it intrudes into the area of supreme federal power. But the Federal Government has heretofore always been content to exercise this power to protect federal supremacy by authorizing its agents to bring lawsuits against state officials once an operative state law has created an actual case and controversy. A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country. I cannot agree to any constitutional interpretation that leads inevitably to such a result.

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[2] The requirement that States come to Washington to have their laws judged is reminiscent of the deeply resented practices used by the English crown in dealing with the American colonies. One of the abuses complained of most bitterly was the King's practice of holding legislative and judicial proceedings in inconvenient and distant places. The signers of the Declaration of Independence protested that the King "has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures," and they objected to the King's "transporting us beyond Seas to be tried for pretended offences." These abuses were fresh in the minds of the Framers of our Constitution and in part caused them to include in Art. 3, § 2, the provision that criminal trials "shall be held in the State where the said Crimes shall have been committed." Also included in the Sixth Amendment was the requirement that a defendant in a criminal prosecution be tried by a "jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

I see no reason to read into the Constitution meanings it did not have when it was adopted and which have not been put into it since. The proceedings of the original Constitutional Convention show beyond all doubt that the power to veto or negative state laws was denied Congress. On several occasions proposals were submitted to the convention to grant this power to Congress. These proposals were debated extensively and on every occasion when submitted for vote they were overwhelmingly rejected.[3] The refusal to give Congress this extraordinary power to veto state laws was based on the belief that if such power resided in Congress the States would be helpless to function as effective governments.[4] Since that time neither the Fifteenth Amendment nor any other Amendment to the Constitution has given the slightest indication of a purpose to grant Congress the power to veto state laws either by itself or its agents. Nor does any provision in the Constitution endow the federal courts with power to participate with state legislative bodies in determining what state policies shall be enacted into law. The judicial power to invalidate a law in a case or controversy after the law has become effective is a long way from the power to prevent a State from passing a law. I cannot agree with the Court that Congress—denied a power in itself to veto a state law—can delegate this same power to the Attorney General or the District Court for the District of Columbia. For the effect on the States is the same in both cases—they cannot pass their laws without sending their agents to the City of Washington to plead to federal officials for their advance approval.

In this and other prior Acts Congress has quite properly vested the Attorney General with extremely broad power to protect voting rights of citizens against discrimination on account of race or color. Section 5 viewed in this context is of very minor importance and in my judgment is likely to serve more as an irritant to the States than as an aid to the enforcement of the Act. I would hold § 5 invalid for the reasons stated above with full confidence that the Attorney General has ample power to give vigorous, expeditious and effective protection to the voting rights of all citizens.[5]

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[3] See Debates in the Federal Convention of 1787 as reported by James Madison in Documents Illustrative of the Formation of the Union of the American States (1927), pp. 605, 789, 856.

[4] One speaker expressing what seemed to be the prevailing opinion of the delegates said of the proposal, "Will any State ever agree to be bound hand & foot in this manner. It is worse than making mere corporations of them . . . ." *Id.*, at 604.

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[5] Section 19 of the Act provides as follows:

"If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby."

PERSONNEL ADMINISTRATOR OF MASSACHUSETTS ET AL. *v.* FEENEY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 78-233. Argued February 26, 1979—Decided June 5, 1979

During her 12-year tenure as a state employee, appellee, who is not a veteran, had passed a number of open competitive civil service examinations for better jobs, but because of Massachusetts' veterans' preference statute, she was ranked in each instance below male veterans who had achieved lower test scores than appellee. Under the statute, all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans. The statutory preference, which is available to "any person, male or female, including a nurse," who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during "wartime," operates overwhelmingly to the advantage of males. Appellee brought an action in Federal District Court, alleging that the absolute-preference formula established in the Massachusetts statute inevitably operates to exclude women from consideration for the best state civil service jobs and thus discriminates against women in violation of the Equal Protection Clause of the Fourteenth Amendment. A three-judge court declared the statute unconstitutional and enjoined its operation, finding that while the goals of the preference were legitimate and the statute had not been enacted for the purpose of discriminating against women, the exclusionary impact upon women was so severe as to require the State to further its goals through a more limited form of preference. On an earlier appeal, this Court vacated the judgment and remanded the case for further consideration in light of the intervening decision in *Washington* v. *Davis,* 426 U. S. 229, which held that a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact and that, instead, the disproportionate impact must be traced to a purpose to discriminate on the basis of race. Upon remand, the District Court reaffirmed its original judgment, concluding that a veterans' hiring preference is inherently nonneutral because it favors a class from which women have traditionally been excluded, and that the consequences of the Massachusetts absolute-preference formula for the employment opportunities of women were too inevitable to have been "unintended."

Held: Massachusetts, in granting an absolute lifetime preference to veterans, has not discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment. Pp. 271–281.

(a) Classifications based upon gender must bear a close and substantial relationship to important governmental objectives. Although public employment is not a constitutional right and the States have wide discretion in framing employee qualifications, any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause. Pp. 271–273.

(b) When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. Pp. 273–274.

(c) Here, the appellee's concession and the District Court's finding that the Massachusetts statute is not a pretext for gender discrimination are clearly correct. Apart from the fact that the definition of "veterans" in the statute has always been neutral as to gender and that Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military, this is not a law that can plausibly, or even rationally, be explained only as a gender-based classification. Significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage. The distinction made by the Massachusetts statute is, as it seems to be, quite simply between veterans and nonveterans, not between men and women. Pp. 274–275.

(d) Appellee's contention that this veterans' preference is "inherently nonneutral" or "gender-biased" in the sense that it favors a status reserved under federal military policy primarily to men is wholly at odds with the District Court's central finding that Massachusetts has not offered a preference to veterans for the purpose of discriminating against women; nor can it be reconciled with the assumption made by both the appellee and the District Court that a more limited hiring preference for veterans could be sustained, since the degree of the preference makes no constitutional difference. Pp. 276–278.

(e) While it would be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable, nevertheless "discriminatory purpose" implies more than intent as volition or intent as awareness of consequences; it implies that the decisionmaker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. When the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men or women. Pp. 278-280.

(f) Although absolute and permanent preferences have always been subject to the objection that they give the veteran more than a square deal, the Fourteenth Amendment "cannot be made a refuge from ill-advised . . . laws." *District of Columbia* v. *Brooke,* 214 U. S. 138, 150. The substantial edge granted to veterans by the Massachusetts statute may reflect unwise policy, but appellee has simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex. Pp. 280-281.

451 F. Supp. 143, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, in which WHITE, J., joined, *post,* p. 281. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 281.

Thomas R. Kiley, Assistant Attorney General of Massachusetts, argued the cause for appellants. With him on the brief were *Francis X. Bellotti,* Attorney General, and *Edward F. Vena,* Assistant Attorney General.

Richard P. Ward argued the cause for appellee. With him on the brief were *Stephen B. Perlman, Eleanor D. Acheson, John H. Mason,* and *John Reinstein.**

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*Briefs of *amici curiae* urging reversal were filed by *Solicitor General McCree, Deputy Solicitor General Easterbrook,* and *William C. Bryson* for the United States; and by *John J. Curtin, Jr.,* for the American Legion.

Samuel J. Rabinove and *Phyllis N. Segal* filed a brief for the National Organization for Women et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Deanne Siemer* for the United States

VILLAGE OF ARLINGTON HEIGHTS ET AL. *v.* METROPOLITAN HOUSING DEVELOPMENT CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 75-616. Argued October 13, 1976—Decided January 11, 1977

Respondent Metropolitan Housing Development Corp. (MHDC), a nonprofit developer, contracted to purchase a tract within the boundaries of petitioner Village in order to build racially integrated low- and moderate-income housing. The contract was contingent upon securing rezoning as well as federal housing assistance. MHDC applied to the Village for the necessary rezoning from a single-family to a multiple-family (R-5) classification. At a series of Village Plan Commission public meetings, both supporters and opponents touched upon the fact that the project would probably be racially integrated. Opponents also stressed zoning factors that pointed toward denial of MHDC's application: The location had always been zoned single-family, and the Village's apartment policy called for limited use of R-5 zoning, primarily as a buffer between single-family development and commercial or manufacturing districts, none of which adjoined the project's proposed location. After the Village denied rezoning, MHDC and individual minority respondents filed this suit for injunctive and declaratory relief, alleging that the denial was racially discriminatory and violated, *inter alia,* the Equal Protection Clause of the Fourteenth Amendment and the Fair Housing Act. The District Court held that the Village's rezoning denial was motivated not by racial discrimination but by a desire to protect property values and maintain the Village's zoning plan. Though approving those conclusions, the Court of Appeals reversed, finding that the "ultimate effect" of the rezoning denial was racially discriminatory and observing that the denial would disproportionately affect blacks, particularly in view of the fact that the general suburban area, though economically expanding, continued to be marked by residential segregation. *Held:*

1. MHDC and at least one individual respondent have standing to bring this action. Pp. 260-264.

(a) MHDC has met the constitutional standing requirements by showing injury fairly traceable to petitioners' acts. The challenged action of the Village stands as an absolute barrier to constructing the housing for which MHDC had contracted, a barrier which could be removed if injunctive relief were granted. MHDC, despite the contingency provisions in its contract, has suffered economic injury based upon the expenditures it made in support of its rezoning petition, as well as noneconomic injury from the defeat of its objective, embodied in its specific project, of making suitable low-cost housing available where such housing is scarce. Pp. 261–263.

(b) Whether MHDC has standing to assert the constitutional rights of its prospective minority tenants need not be decided, for at least one of the individual respondents, a Negro working in the Village and desirous of securing low-cost housing there but who now lives 20 miles away, has standing. Focusing on the specific MHDC project, he has adequately alleged an "actionable causal relationship" between the Village's zoning practices and his asserted injury. *Warth* v. *Seldin*, 422 U. S. 490, 507. Pp. 263–264.

2. Proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause of the Fourteenth Amendment, and respondents failed to carry their burden of proving that such an intent or purpose was a motivating factor in the Village's rezoning decision. Pp. 264–271.

(a) Official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "[Such] impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Washington* v. *Davis*, 426 U. S. 229, 242. A racially discriminatory intent, as evidenced by such factors as disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decisionmakers, must be shown. Pp. 264–268.

(b) The evidence does not warrant overturning the concurrent findings of both courts below that there was no proof warranting the conclusion that the Village's rezoning decision was racially motivated. Pp. 268–271.

3. The statutory question whether the rezoning decision violated the Fair Housing Act of 1968 was not decided by the Court of Appeals and should be considered on remand. P. 271.

517 F. 2d 409, reversed and remanded.

Powell, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, Blackmun, and Rehnquist, JJ., joined. Marshall, J., filed an opinion concurring in part and dissenting in part, in which Brennan, J., joined, *post*, p. 271. White, J., filed a dissenting opinion, *post*, p. 272. Stevens, J., took no part in the consideration or decision of the case.

Jack M. Siegel argued the cause and filed briefs for petitioners.

F. Willis Caruso argued the cause for respondents. With him on the briefs were *Carol M. Petersen* and *Robert G. Schwemm.**

MR. JUSTICE POWELL delivered the opinion of the Court.

In 1971 respondent Metropolitan Housing Development Corporation (MHDC) applied to petitioner, the Village of Arlington Heights, Ill., for the rezoning of a 15-acre parcel from single-family to multiple-family classification. Using federal financial assistance, MHDC planned to build 190 clustered townhouse units for low- and moderate-income tenants. The Village denied the rezoning request. MHDC, joined by other plaintiffs who are also respondents here, brought suit in the United States District Court for the Northern District of Illinois.[1] They alleged that the denial was racially discriminatory and that it violated, *inter alia*, the Fourteenth Amendment and the Fair Housing Act of 1968, 82 Stat. 81, 42 U. S. C. § 3601 *et seq.* Following a bench trial, the District Court entered judgment for the Village, 373 F. Supp. 208 (1974), and respondents appealed. The Court of Appeals for the Seventh Circuit reversed, finding that the "ultimate effect" of the denial was racially discriminatory, and that the refusal to rezone therefore violated the Fourteenth Amendment. 517 F. 2d 409 (1975). We granted the Village's petition for certiorari, 423 U. S. 1030 (1975), and now reverse.

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*Briefs of *amici curiae* urging affirmance were filed by *Conrad N. Bagne* for the American Society of Planning Officials, and by *Abe Fortas* and *Stephen C. Shamberg* for the League of Women Voters of the United States et al.

[1] Respondents named as defendants both the Village and a number of its officials, sued in their official capacity. The latter were the Mayor, the Village Manager, the Director of Building and Zoning, and the entire Village Board of Trustees. For convenience, we will occasionally refer to all the petitioners collectively as "the Village."

I

Arlington Heights is a suburb of Chicago, located about 26 miles northwest of the downtown Loop area. Most of the land in Arlington Heights is zoned for detached single-family homes, and this is in fact the prevailing land use. The Village experienced substantial growth during the 1960's, but, like other communities in northwest Cook County, its population of racial minority groups remained quite low. According to the 1970 census, only 27 of the Village's 64,000 residents were black.

The Clerics of St. Viator, a religious order (Order), own an 80-acre parcel just east of the center of Arlington Heights. Part of the site is occupied by the Viatorian high school, and part by the Order's three-story novitiate building, which houses dormitories and a Montessori school. Much of the site, however, remains vacant. Since 1959, when the Village first adopted a zoning ordinance, all the land surrounding the Viatorian property has been zoned R-3, a single-family specification with relatively small minimum lot-size requirements. On three sides of the Viatorian land there are single-family homes just across a street; to the east the Viatorian property directly adjoins the backyards of other single-family homes.

The Order decided in 1970 to devote some of its land to low- and moderate-income housing. Investigation revealed that the most expeditious way to build such housing was to work through a nonprofit developer experienced in the use of federal housing subsidies under § 236 of the National Housing Act, 48 Stat. 1246, as added and amended, 12 U. S. C. § 1715z-1.[2]

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[2] Section 236 provides for "interest reduction payments" to owners of rental housing projects which meet the Act's requirements, if the savings are passed on to the tenants in accordance with a rather complex formula. Qualifying owners effectively pay 1% interest on money borrowed to

WASHINGTON, MAYOR OF WASHINGTON, D. C., ET AL. *v.* DAVIS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1492. Argued March 1, 1976—Decided June 7, 1976

Respondents Harley and Sellers, both Negroes (hereinafter respondents), whose applications to become police officers in the District of Columbia had been rejected, in an action against District of Columbia officials (petitioners) and others, claimed that the Police Department's recruiting procedures, including a written personnel test (Test 21), were racially discriminatory and violated the Due Process Clause of the Fifth Amendment, 42 U. S. C. § 1981, and D. C. Code § 1-320. Test 21 is administered generally to prospective Government employees to determine whether applicants have acquired a particular level of verbal skill. Respondents contended that the test bore no relationship to job performance and excluded a disproportionately high number of Negro applicants. Focusing solely on Test 21, the parties filed cross-motions for summary judgment. The District Court, noting the absence of any claim of intentional discrimination, found that respondents' evidence supporting their motion warranted the conclusions that (a) the number of black police officers, while substantial, is not proportionate to the city's population mix; (b) a higher percentage of blacks fail the test than whites; and (c) the test has not been validated to establish its reliability for measuring subsequent job performance. While that showing sufficed to shift the burden of proof to the defendants in the action, the court concluded that respondents were not entitled to relief, and granted petitioners' motion for summary judgment, in view of the facts that 44% of new police recruits were black, a figure proportionate to the blacks on the total force and equal to the number of 20- to 29-year-old blacks in the recruiting area; that the Police Department had affirmatively sought to recruit blacks, many of whom passed the test but failed to report for duty; and that the test was a useful indicator of training school performance (precluding the need to show validation in terms of job performance) and was not designed to, and did not, discriminate against otherwise qualified blacks. Respondents on appeal contended that their summary judgment motion (which was based solely on the contention that Test 21 invidiously discriminated against Negroes in violation of the Fifth Amendment) should have been granted. The Court of Appeals reversed, and directed summary judgment in favor of respondents, having applied to the constitutional issue the statutory standards enunciated in *Griggs* v. *Duke Power Co.*, 401 U. S. 424, which held that Title VII of the Civil Rights Act of 1964, as amended, prohibits the use of tests that operate to exclude members of minority groups, unless the employer demonstrates that the procedures are substantially related to job performance. The court held that the lack of discriminatory intent in the enactment and administration of Test 21 was irrelevant; that the critical fact was that four times as many blacks as whites failed the test; and that such disproportionate impact sufficed to establish a constitutional violation, absent any proof by petitioners that the test adequately measured job performance. *Held:*

1. The Court of Appeals erred in resolving the Fifth Amendment issue by applying standards applicable to Title VII cases. Pp. 238-248.

(a) Though the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the Government from invidious discrimination, it does not follow that a law or other official act is unconstitutional *solely* because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose. Pp. 239-245.

(b) The Constitution does not prevent the Government from seeking through Test 21 modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special abilities to communicate orally and in writing; and respondents, as Negroes, could no more ascribe their failure to pass the test to denial of equal protection than could whites who also failed. Pp. 245-246.

(c) The disproportionate impact of Test 21, which is neutral on its face, does not warrant the conclusion that the test was a purposely discriminatory device, and on the facts before it the District Court properly held that any inference of discrimination was unwarranted. P. 246.

(d) The rigorous statutory standard of Title VII involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where, as in this case, special racial impact but no discriminatory purpose is claimed. Any extension of that statutory standard should await legislative prescription. Pp. 246-248.

2. Statutory standards similar to those obtaining under Title VII were also satisfied here. The District Court's conclusion that Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and that program was sufficient to validate the test (wholly aside from its possible relationship to actual performance as a police officer) is fully supported on the record in this case, and no remand to establish further validation is appropriate. Pp. 248-252.

168 U. S. App. D. C. 42, 512 F. 2d 956, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined, and in Parts I and II of which STEWART, J., joined. STEVENS, J., filed a concurring opinion, *post*, p. 252. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 256.

David P. Sutton argued the cause for petitioners. With him on the briefs were *C. Francis Murphy, Louis P. Robbins,* and *Richard W. Barton.*

Richard B. Sobol argued the cause for respondents Harley et al. With him on the briefs were *George Cooper, Richard T. Seymour, Marian Wright Edelman, Michael B. Trister,* and *Ralph J. Temple. Mark L. Evans* argued the cause for the Commissioners of the United States Civil Service Commission as respondents under this Court's Rule 21 (4). With him on the brief were *Solicitor General Bork, Assistant Attorney General Lee, Ronald R. Glancz,* and *Harry R. Silver.**

**R. Lawrence Ashe, Jr.,* and *Susan A. Cahoon* filed a brief for the Executive Committee of the Division of Industrial-Organizational Psychology (Div. 14) of the American Psychological Assn. as *amicus curiae* urging reversal.

Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston,

Herman LODGE et al.,
Plaintiffs-Appellees,

v.

J. F. BUXTON et al., Defendants,

Ray DeLaigle et al.,
Defendants-Appellants.

No. 78-3241.

United States Court of Appeals,
Fifth Circuit.
Unit B

March 20, 1981.

In an action to have a county's system of at-large elections declared invalid as violative of the First, Fourteenth and Fifteenth Amendments to the United States Constitution and certain statutes, the United States District Court for the Southern District of Georgia at Augusta, Anthony A. Alaimo, Chief Judge, held for the plaintiffs and ordered a change of the system. On appeal by the defendants, the Court of Appeals, Fay, Circuit Judge, held that: (1) District Court's conclusion that historical and present discrimination operated in conjunction with officially sanctioned electoral system to unfairly limit access of Blacks to political process was not clearly erroneous, and same was true of District Court's finding that state policy behind at-large election system, although neutral in origin, had been subverted to invidious purposes, and (2) District Court acted properly in its provision for relief.

Affirmed.

Henderson, Circuit Judge, dissented and filed opinion.

1. Elections 🔑12

At-large voting is not per se unconstitutional. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. §§ 1971, 1971(a)(1); Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

2. Elections 🔑12

No group, whether racially or ethnically identifiable, has a right to elect representatives proportionate to its voting power in community. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. §§ 1971, 1971(a)(1); Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

3. Elections 🔑12

Even consistent defeat at polls by racial minority does not alone give rise to constitutional claims. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. §§ 1971, 1971(a)(1); Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

4. Elections 🔑12

To secure finding that election law, racially neutral on its face, is unconstitutional, plaintiff must prove that it was conceived or maintained with intent or purpose of promoting invidious discrimination. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. §§ 1971, 1971(a)(1); Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

5. Elections 🔑12

In voting dilution case, plaintiff was required to establish that racially neutral at-large system was created or maintained for purpose of preventing minority groups from effectively participating in the electoral process. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. §§ 1971, 1971(a)(1); Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

6. Elections 🔑12

Second section of Voting Rights Act does not provide remedy for conduct not covered by Fifteenth Amendment. U.S.C.A.Const. Amend. 15; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

7. Constitutional Law 🔑215.3
Elections 🔑12

Plaintiff bringing voting dilution case attacking electoral system that is racially neutral on its face may challenge such system on grounds that it violates either Fourteenth or Fifteenth Amendment. U.S.C.A. Const. Amends. 14, 15.

8. Elections ⇨12

Plaintiff challenging at-large voting system must prove that system was created or maintained for purpose of limiting access of or excluding Blacks from effective participation in that system. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

9. Elections ⇨12

Racially definable group may challenge electoral system on dilution grounds only if it can be shown that system invidiously operates to detriment of their interests, and unresponsiveness may be necessary element to maintenance of action, but although proof of unresponsiveness alone does not give rise to inference that system is maintained for discriminatory purposes, and conclusion must be reached only in light of totality of circumstances presented, direct evidence of intent is not required. U.S.C.A. Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

10. Constitutional Law ⇨215.3
Elections ⇨12

Essential element of prima facie case under Fourteenth or Fifteenth Amendment asserting unconstitutional vote dilution through maintenance of at-large electoral system is proof of unresponsiveness by public body in question to group claiming injury, but responsiveness is determinative factor only in its absence, and proof of unresponsiveness does not establish prima facie case sufficient to shift burden of proof to party defending constitutionality. U.S.C.A. Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

11. Elections ⇨12

Criteria of *Zimmer* case, i. e., lack of access to process of slating candidates, unresponsiveness of legislators to minority's particular interests, tenuous state policy underlying preference for multimember or at-large districting, existence of past discrimination in general precluding effective participation in election system, existence of large districts, majority vote requirements, antisingle shot voting provisions, and lack of provisions for at-large candidates running from particular geographical subdistricts may be indicative but are not dispositive on question of intent, and are relevant only to extent that they allow trial court to draw inference of intent and, being not exclusive indicia of discriminatory purpose, may in given case be replaced or supplemented by more meaningful factors. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

12. Federal Courts ⇨855

In vote dissolution case, Court of Appeals will give great deference to judgment of trial court which is in far better position to evaluate local political, social and economic realities than is Court of Appeals. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

13. Elections ⇨12

Bloc voting is not illegal, but inquiry into voting patterns is relevant, and plaintiff would be hard pressed to prove that system was being maintained for invidious purposes, without proof of bloc voting. U.S.C.A.Const. Amends. 1, 14, 15; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

14. Counties ⇨38

In suit to have county's system of at-large elections declared invalid, district court's conclusion that effect of historical discrimination was to restrict opportunity of Blacks to participate in electoral process in the present was not clearly erroneous, and same was true of district court's finding of unresponsiveness and insensitivity to legitimate rights of county's Black residents and of conclusion that Blacks in county suffered from severe socioeconomic depression which was caused at least in part by past discrimination and which had a direct negative impact on opportunity for Blacks to effectively participate in electoral process. U.S.C.A. Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

15. Counties ⚷38

In suit to have county's system of at-large elections declared invalid, district court's conclusion that historical and present discrimination operated in conjunction with officially sanctioned electoral system to unfairly limit access of Blacks to political process was not clearly erroneous, and same was true of court's finding that state policy behind at-large election system, although neutral in origin, had been subverted to invidious purposes. U.S.C.A. Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

16. Counties ⚷38

In action to have county's system of at-large elections declared invalid, well-supported or not clearly erroneous conclusions of district court properly permitted district court to draw inference that at-large electoral system had been maintained for purpose of restricting access of county's Black residents to that system and was being maintained for invidious purposes. U.S.C. A.Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973; Ga.Code, §§ 34-501, 34-605, 34-1310(b), 34A-903.

17. Counties ⚷38

On finding that county's system of at-large elections was being maintained for invidious purposes, district court properly ordered that five county commissioners for county be elected in single-member districts in all future elections and properly adopted original plan submitted by plaintiff, plan having substantially smaller population deviations among districts than plan submitted by defendants. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973; Ga.Code, §§ 34-501, 34-605, 34-1310(b), 34A-903.

E. Freeman Leverett, Elberton, Ga., Preston B. Lewis, Jr., Waynesboro, Ga., for defendants-appellants.

David F. Walbert, Atlanta, Ga., Robert W. Cullen, Augusta, Ga., Laughlin McDonald, Neil Bradley, H. Christopher Coates, Atlanta, Ga., for plaintiffs-appellees.

Thomas M. Keeling, J. Gerald Hebert, Attys., Dept. of Justice, Washington, D. C., for amicus curiae U. S. A.

Appeal from the United States District Court for the Southern District of Georgia.

Before JONES, FAY and HENDERSON, Circuit Judges.

FAY, Circuit Judge:

Plaintiff class, consisting of all Black residents of Burke County, Georgia, brought this action to have that county's system of at-large elections declared invalid as violative of the First, Fourteenth and Fifteenth Amendments to the United States Constitution and Title 42 U.S.C. §§ 1971 and 1973. The District Court for the Southern District of Georgia held for the plaintiffs, on the grounds that the at-large election process was maintained for the purpose of limiting Black access to the political system in violation of their Fourteenth and Fifteenth Amendment rights. Accordingly, the District Court ordered that the existing system of at-large elections be abandoned and that the county be divided into five districts with each district electing one county commissioner. We affirm the judgment of the District Court in all respects.

FACTS

This case arose in Burke County, a large and predominantly rural county in southern

Georgia. In fact Burke County is the second largest of Georgia's 159 counties in terms of the area it encompasses.[1] Burke is similar to many rural counties in Georgia in that its economic base is predominantly agricultural. The county's population is somewhat over 10,000 people, a slight majority of whom are Black.[2] No Black has ever been elected to the county commission in Burke County.

This suit was filed in 1976 by various named plaintiffs as representatives of the class of all Black residents of Burke County.[3] It alleged that the county's system of at-large elections violated plaintiff's First, Fourteenth and Fifteenth Amendment rights, as well as their rights under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and the Reconstruction Act, 42 U.S.C. § 1971, by diluting the significance of the Black vote, thereby unconstitutionally restricting their right to meaningful access to and participation in the electoral process.

After a trial, during which both parties offered voluminous evidence in support of their respective positions, the District Court held for plaintiff. The court concluded that the at-large system had been maintained for the purpose of limiting Black participation in the electoral process. The court entered an order, setting forth the findings of fact and conclusions of law, requiring Burke County to elect five county commissioners, one from each of five districts into which the county was to be divided.[4] The court's order of October 26, 1978 was to be effectuated by the time of the general elec-

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[1] Burke County is 832 square miles in area, making it approximately the size of two-thirds of the State of Rhode Island.

[2] The following population table is taken from the District Court's findings of fact and conclusions of law:

	TOTAL	PERCENTAGE *a	
YEAR *c	POPULATION	WHITE *b	BLACK
1975	18,700	42%	58%
1970	18,248	40%	60%
1960	20,596	34%	66%
1950	23,458	29%	71%
1940	26,520	25%	75%
1930	29,224	22%	78%

*a
Percentage is to the nearest whole percent.

*b
The "percentage white" figure includes a category labelled "foreign born white"; the greatest number in this group was 42, in 1930. After 1930, this statistic apparently was not kept.

*c
The 1975 figures are a mid-census estimate taken from plaintiffs' exhibit 191.

In addition, the record indicates that the disparity in size between the White and Black residents of Burke County has continued to decrease since 1975, so that the current Black majority is very slight.

[3] The class was actually certified by Judge Alaimo on May 12, 1977, some eleven months after suit was filed.

[4] The following table shows a breakdown of the population of the districts in the plan selected by the District Court as to race and voting age and percentage deviation by district:

District	Total Population	Black Population (%)	White Population(%)	% Deviation
1	3,736	2,899 (77.6)	837 (22.4)	+2.3
2	3,673	2,753 (74.9)	920 (25.1)	+0.5
3	3,595	1,914 (53.2)	1,681 (46.8)	-1.6
4	3,590	1,852 (51.6)	1,738 (48.4)	-1.7
5	3,661	1,570 (42.9)	2,091 (57.1)	+0.3

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., ET AL. *v.* CAREY, GOVERNOR OF NEW YORK, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 75–104. Argued October 6, 1976—Decided March 1, 1977

After New York State had submitted for the approval of the Attorney General its 1972 reapportionment statute with respect to Kings County and two other counties which were subject to §§ 4 and 5 of the Voting Rights Act of 1965, he concluded that as to certain districts in Kings County the State had not met its burden under § 5 of demonstrating that the redistricting had neither the purpose nor the effect of abridging the right to vote by reason of race or color. In May 1974 the State submitted to the Attorney General a revision of those portions of the 1972 plan to which he had objected, including provisions for elections to the state senate and assembly from Kings County. The 1974 plan did not change the number of districts with nonwhite majorities but did change the size of the nonwhite majorities in most of those districts. To attain a nonwhite majority of 65%, which it was felt would be acceptable to the Attorney General for the assembly district in which the Hasidic Jewish community was located (which had been 61% nonwhite under the 1972 plan), a portion of the white population, including part of the Hasidic community, was reassigned to an adjoining district, and that community was also split between two senatorial districts though it had been within one such district under the 1972 plan. Petitioners, on behalf of the Hasidic community, brought this suit for injunctive and declaratory relief, alleging that the 1974 plan violated their rights under the Fourteenth and Fifteenth Amendments. Petitioners contended that the plan "would dilute the value of [their] franchise by halving its effectiveness," solely for the purpose of achieving a racial quota, and that they were assigned to electoral districts solely on the basis of race. Upon motions by the Attorney General (who had advised the State that he did not object to the 1974 plan) and an intervenor, the District Court dismissed the complaint, holding that petitioners enjoyed no constitutional right in reapportionment to separate community recognition as Hasidic Jews; that the redistricting did not disenfranchise them; and that racial considerations were permissible to correct past discrimination. The Court of Appeals affirmed. Noting that the 1974 plan left approximately 70% of the Kings County senate and assembly districts with white majorities and that only 65% of the county was white, the court held that the plan would not underrepresent the white population. The court, relying on *Allen* v. *State Board of Elections,* 393 U. S. 544, 569, concluded that a State could use racial considerations in an effort to secure the approval of the Attorney General under the Voting Rights Act, reasoning that the Act contemplated that he and the state legislature would have "to think in racial terms"; because the Act "necessarily deals with race or color, corrective action under it must do the same." *Held:* The judgment is affirmed. Pp. 155–168; 179–180.

510 F. 2d 512, affirmed.

MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS, concluded that the use of racial criteria by the State of New York in its 1974 plan in attempting to comply with § 5 of the Act and to secure the approval of the Attorney General did not violate the Fourteenth or Fifteenth Amendment. Pp. 155–165.

(a) Under § 5, new or revised reapportionment plans are among those voting procedures, standards, or practices that may not be adopted by a State covered by the Act without a ruling by the Attorney General or the specified court that the plan does not have a racially discriminatory purpose or effect. *Allen* v. *State Board of Elections, supra.* Pp. 157–159.

(b) Compliance with the Act in reapportionment cases will often necessitate the use of racial considerations in drawing district lines, and the Constitution does not prevent a State subject to the Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5. *Beer* v. *United States,* 425 U. S. 130; *City of Richmond* v. *United States,* 422 U. S. 358. Pp. 159–161.

(c) Permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment. P. 161.

(d) A reapportionment cannot violate the Fourteenth or Fifteenth Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts. P. 162.

(e) Petitioners have not shown or offered to prove that minority voting strength was increased under the 1974 plan in comparison with the 1966 apportionment and thus have not shown that New York did more than the Attorney General was authorized to require it to do under the nonretrogression principle of *Beer* v. *United States, supra,* a principle that this Court has accepted as constitutionally valid. Pp. 162–165.

MR. JUSTICE WHITE, joined by MR. JUSTICE STEVENS and MR. JUSTICE REHNQUIST, concluded that, wholly aside from New York's obligations under the Act to preserve minority voting strength in Kings County, the Constitution permits the State to draw lines deliberately in such a way that the percentage of districts with a nonwhite majority roughly approximates the percentage of nonwhites in the county. Though in individual districts where nonwhite majorities were increased to about 65% it became more likely that nonwhite candidates would be elected, as long as Kings County whites, as a group, were provided with fair representation, there was no cognizable discrimination against whites. See *Gaffney* v. *Cummings,* 412 U. S. 735, 754. Pp. 165–168.

MR. JUSTICE STEWART, joined by MR. JUSTICE POWELL, concluded that, having failed to show that the 1974 plan had either the purpose or effect of discriminating against them because of their race, petitioners, who erroneously contend that racial awareness in legislative reapportionment is unconstitutional *per se,* have offered no basis for affording them the constitutional relief that they seek. Pp. 179–180.

WHITE, J., announced the Court's judgment, and delivered an opinion in which STEVENS, J., joined; in all but Part IV of which BRENNAN and BLACKMUN, JJ., joined; and in Parts I and IV of which REHNQUIST, J., joined. BRENNAN, J., filed an opinion concurring in part, *post,* p. 168. STEWART, J., filed an opinion concurring in the judgment, in which POWELL, J., joined, *post,* p. 179. BURGER, C. J., filed a dissenting opinion, *post,* p. 180. MARSHALL, J., took no part in the consideration or decision of the case.

Nathan Lewin argued the cause and filed a brief for petitioners.

George D. Zuckerman, Assistant Attorney General of New York, argued the cause for respondents Carey et al. With him on the brief were *Louis J. Lefkowitz,* Attorney General, and *Samuel A. Hirshowitz,* First Assistant Attorney General. *Solicitor General Bork* argued the cause for the United States. With him on the brief were *Assistant Attorney General Pottinger, Deputy Solicitor General Wallace, John P. Rupp, Brian K. Landsberg,* and *William C. Graves. Louis H. Pollak* ar-

CITY OF RICHMOND, VIRGINIA *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 74-201. Argued April 23, 1975—Decided June 24, 1975

In 1969 a Virginia court approved annexation by the city of Richmond, effective January 1, 1970, of an adjacent area in Chesterfield County, which reduced the proportion of Negroes in Richmond from 52% to 42%. The preannexation nine-man city council, which was elected at large, had three members who were endorsed by a Negro civic organization. In a postannexation at-large election in 1970, three of the nine members elected were also endorsed by that organization. Following this Court's holding in *Perkins* v. *Matthews*, 400 U. S. 379, that § 5 of the Voting Rights Act of 1965 (Act) reaches the extension of a city's boundaries through annexation, the city of Richmond unsuccessfully sought the Attorney General's approval of the Chesterfield County annexation. Meanwhile respondent Holt brought an action in federal court in Virginia challenging the annexation on constitutional grounds, and the District Court issued a decision, *Holt* v. *City of Richmond*, 334 F. Supp. 228 (*Holt I*), holding that the annexation had an illegal racial purpose, and ordered a new election. The Court of Appeals reversed. In the interim, Holt had brought another suit (*Holt II*) in the District Court seeking to have the annexation invalidated under § 5 of the Act for lack of the approval required by the Act. As the result of the *Holt II* suit, which was stayed pending the outcome of the instant litigation, further city council elections have been enjoined and the 1970 council has remained in office. Having received no response from the Attorney General to a renewed approval request, the city brought this suit in the District Court for the District of Columbia, seeking approval of the annexation and relying on the Court of Appeals' decision in *Holt I*. Shortly thereafter, the District Court decided *City of Petersburg* v. *United States*, 354 F. Supp. 1021, aff'd, 410 U. S. 962, invalidating another Virginia annexation plan where at-large council elections were the rule before and after annexation but indicating that approval could be obtained if "modifications calculated to neutralize . . .

any adverse effect upon the political participation of black voters are adopted, i. e., that the plaintiff shift from an at-large to a ward system of electing its city councilmen." Richmond thereafter developed and the Attorney General approved a plan for nine wards, four with substantial black majorities, four with substantial white majorities, and the ninth with a 59% white, 41% black division. Following opposition by interyenors, the plan was referred to a Special Master, who concluded that the city had not met its burden of proving that the annexation's purpose was not to dilute the black vote, and that the ward plan did not cure the racially discriminatory purpose. Additionally, he concluded that the annexation's diluting effect had not been dissipated to the greatest extent possible, that no acceptable offsetting economic or administrative benefits had been shown, and that deannexation was the only acceptable remedy for the § 5 violations. Except for the deannexation recommendation, the District Court accepted the Special Master's findings and conclusions. The District Court concluded that "[i]f the proportion of blacks in the new citizenry from the annexed area is appreciably less than the proportion of blacks living within the city's old boundaries, and particularly if there is a history of racial bloc voting in the city, the voting power of black citizens as a class is diluted and thus abridged." The matter of the remedy to be fashioned was left for resolution in the still-pending *Holt II*. *Held:*

1. An annexation reducing the relative political strength of the minority race in the enlarged city as compared with what it was before the annexation does not violate § 5 of the Act as long as the postannexation system fairly recognizes, as it does in this case, the minority's political potential. Pp. 367–372.

(a) Although *Perkins* v. *Matthews*, *supra*, held that boundary changes by annexation have a sufficient potential for racial voting discrimination to require § 5 approval procedures, this does not mean that every annexation effecting a percentage reduction in the Negro population is prohibited by § 5. Though annexation of an area with a white majority, combined with at-large councilmanic elections and racial voting create or enhance the power of the white majority to exclude Negroes totally from the city council, that consequence can be satisfactorily obviated if at-large elections are replaced by a ward system of choosing councilmen, affording Negroes representation reasonably equivalent to their political strength in the enlarged community. Though the black community, if there is racial bloc voting, will have fewer councilmen, a different city council and an enlarged city are involved in the annexation. Negroes, moreover, will not be underrepresented. Pp. 368–371.

(b) The plan here under review does not undervalue the postannexation black voting strength or have the effect of denying or abridging the right to vote within the meaning of § 5. Pp. 371–372.

2. Since § 5 forbids voting changes made for the purpose of denying the vote for racial reasons, further proceedings are necessary to update and reassess the evidence bearing upon the issue whether the city has sound, nondiscriminatory economic and administrative reasons for retaining the annexed area, it not being clear that the Special Master and the District Court adequately considered the evidence in deciding whether there are now justifiable reasons for the annexation that took place on January 1, 1970. Pp. 372–379.

376 F. Supp. 1344, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 379. POWELL, J., took no part in the consideration or decision of the case.

Charles S. Rhyne argued the cause for appellant. With him on the briefs were *David M. Dixon, Daniel T. Balfour, Conrad B. Mattox, Jr., Horace H. Edwards,* and *John S. Davenport III.*

Deputy Solicitor General Wallace argued the cause for the United States et al. in support of the appellant. With him on the brief were *Solicitor General Bork, Assistant Attorney General Pottinger, Keith A. Jones,* and *Brian K. Landsberg.*

Armand Derfner argued the cause for appellees Crusade for Voters of Richmond et al. With him on the brief were *James P. Parker* and *J. Harold Flannery. W. H. C. Venable* argued the cause for appellees Holt et al. With him on the brief was *John M. McCarthy.*

WHITCOMB, GOVERNOR OF INDIANA *v.* CHAVIS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

No. 92. Argued December 8, 1970—Decided June 7, 1971

This suit was brought by residents of Marion and Lake Counties, Indiana, challenging state statutes establishing Marion County as a multi-member district for the election of state senators and representatives. It was alleged, first, that the laws invidiously diluted the votes of Negroes and poor persons living in the "ghetto area" of Marion County, and, second, that voters in multi-member districts were overrepresented since the true test of voting power is the ability to cast a tie-breaking vote, and the voters in multi-member districts had a greater theoretical opportunity to cast such votes than voters in single-member districts. The tendency of multi-member district legislators to vote as a bloc was alleged to compound this discrimination. The three-judge court, though not ruling squarely on the second claim, determined that a racial minority group with specific legislative interests inhabited a ghetto area in Indianapolis, in Marion County; that the statutes operated to minimize and cancel out the voting strength of this minority group; and that redistricting Marion County alone would leave impermissible variations between Marion districts and others in the State, thus requiring statewide redistricting, which could not await 1970 census figures. The court held the statutes unconstitutional, and gave the State until October 1, 1969, to enact reapportionment legislation. No such legislation ensued, and the court drafted a plan using single-member districts throughout the State. The 1970 elections were ordered to be held in accordance with the new plan. This Court granted a stay of judgment pending final action on the appeal, thus permitting the 1970 elections to be held under the condemned statutes. Under those statutes, based on the 1960 census, there was a maximum variance in population of senate districts of 28.20%, with a ratio between the largest and smallest districts of 1.327 to 1, and a maximum variance in house districts of 24.78%, with a ratio of 1.279 to 1. *Held:* The judgment is reversed and the case remanded. Pp. 140–170; 179–180.

305 F. Supp. 1364, reversed and remanded.

MR. JUSTICE WHITE delivered the opinion of the Court with respect to Parts I–VI, finding that:

1. Although, as the Court was advised on June 1, 1971, the Indiana legislature enacted new apportionment legislation providing for statewide single-member house and senate districts, the case is not moot. Pp. 140–141.

2. The validity of multi-member districts is justiciable, but a challenger has the burden of proving that such districts unconstitutionally operate to dilute or cancel the voting strength of racial or political groups. Pp. 141–144.

3. The actual, as distinguished from theoretical, impact of multi-member districts on individual voting power has not been sufficiently demonstrated on this record to warrant departure from prior cases involving multi-member districts, and neither the findings below nor the record sustains the view that multi-member districts overrepresent their voters as compared with voters in single-member districts, even if the multi-member legislative delegation tends to bloc voting. Pp. 144–148.

4. Appellees' claim that the fact that the number of ghetto residents who were legislators was not proportionate to ghetto population proves invidious discrimination, notwithstanding the absence of evidence that ghetto residents had less opportunity to participate in the political process, is not valid, and on this record the malproportion was due to the ghetto voters' choices losing the election contests. Pp. 148–155.

5. The trial court's conclusion that, with respect to their unique interests, ghetto residents were invidiously underrepresented due to lack of their own legislative voice, was not supported by the findings. Moreover, even assuming bloc voting by the county delegation contrary to the ghetto majority's wishes, there is no constitutional violation, since that situation inheres in the political process, whether the district be single- or multi-member. P. 155.

6. Multi-member districts have not been proved inherently invidious or violative of equal protection, but, even assuming their unconstitutionality, it is not clear that the remedy is a single-member system with lines drawn to ensure representation to all sizable racial, ethnic, economic, or religious groups. Pp. 156–160.

7. The District Court erred in brushing aside the entire state apportionment policy without solid constitutional and equitable

grounds for doing so, and without considering more limited alternatives. Pp. 160–161.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE BLACKMUN, concluded, in Part VII, that it was not improper for the District Court to order statewide redistricting on the basis of the excessive population variances between the legislative districts shown by this record. That court ordered reapportionment not because of population shifts since its 1965 decision upholding the statutory plan but because the disparities had been shown to be excessive by intervening decisions of this Court. Pp. 161–163.

MR. JUSTICE DOUGLAS, joined by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, concluded, with respect to redistricting the entire State, that there were impermissible population variances between districts under the current apportionment plan, and that the new Marion County districts would also have impermissible variances, thus requiring statewide redistricting. Pp. 179–180.

WHITE, J., announced the Court's judgment and delivered an opinion, of the Court with respect to Parts I–VI, in which BURGER, C. J., and BLACK, STEWART, and BLACKMUN, JJ., joined, and in which, as to Part VII, BURGER, C. J., and BLACK and BLACKMUN, JJ., joined. STEWART, J., filed a statement joining in Parts I–VI and dissenting from Part VII, *post,* p. 163. HARLAN, J., filed a separate opinion, *post,* p. 165. DOUGLAS, J., filed an opinion dissenting in part and concurring in the result in part, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 171.

William F. Thompson, Assistant Attorney General of Indiana, argued the cause for appellant. With him on the briefs were *Theodore L. Sendak,* Attorney General, and *Richard C. Johnson,* Chief Deputy Attorney General.

James Manahan argued the cause for appellees. With him on the brief were *James Beatty* and *John Banzhaf III.*

William J. Scott, Attorney General, and *Francis C. Crowe* and *Herman Tavins,* Assistant Attorneys General, filed a brief for the State of Illinois as *amicus curiae*

ALLEN ET AL. *v.* STATE BOARD OF ELECTIONS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 3. Argued October 15, 1968.—Decided March 3, 1969.[*]

Pursuant to § 4 (b) of the Voting Rights Act of 1965 the provisions of § 4 (a), suspending all "tests or devices" for five years, were made applicable to certain States, including Mississippi and Virginia. As a result, those States were prohibited by § 5 from enacting or seeking "to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," without first submitting the change to the U. S. Attorney General and obtaining his consent or securing a favorable declaratory judgment from the District Court for the District of Columbia. In Nos. 25, 26, and 36, appellants sought declaratory judgments in the District Court for the Southern District of Mississippi that certain amendments to the Mississippi Code were subject to the provisions of § 5 and thus not enforceable until the State complied with the approval requirements. In No. 25 the amendment provided for at-large election of county supervisors instead of election by districts. In No. 26 the amendment eliminated the option of electing or appointing superintendents of education in 11 counties and provided that they shall be appointed. The amendment in No. 36 changed the requirements for independent candidates running in general elections. In all three cases the three-judge District Court ruled that the amendments did not come within the purview of § 5 and dismissed the complaints. No. 3 concerned a bulletin issued by the Virginia Board of Elections instructing election judges to assist qualified, illiterate voters who request assistance in marking ballots. Appellants sought a declaratory judgment in the District Court for the Eastern District of

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[*] Together with No. 25, *Fairley et al.* v. *Patterson, Attorney General of Mississippi, et al.*, No. 26, *Bunton et al.* v. *Patterson, Attorney General of Mississippi, et al.*, and No. 36, *Whitley et al.* v. *Williams, Governor of Mississippi, et al.*, on appeal from the United States District Court for the Southern District of Mississippi, argued on October 16, 1968.

Virginia that the statute providing for handwritten write-in votes and the modifying bulletin violated the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act. In the 1966 election appellants attempted to use labels for write-in candidates, but the election officials refused to count appellants' ballots. Appellants sought only prospective relief, as the election outcome would not have been changed if the ballots had been counted. In the District Court they did not argue that § 5 precluded enforcement of the procedure set out in the bulletin but that § 4 suspended the write-in requirement. The three-judge court dismissed the complaint. *Held:*

1. Since the Virginia legislation was generally attacked as inconsistent with the Voting Rights Act, and there is no factual dispute, the Court may, in the interests of judicial economy, determine the applicability in No. 3 of § 5 of the Act, even though that section was not argued below. P. 554.

2. Private litigants may invoke the jurisdiction of the district courts to obtain relief under § 5, to insure the Act's guarantee that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to that section. Pp. 554–557.

3. The restriction of § 14 (b) of the Act, which provides that "[n]o court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any declaratory judgment pursuant to [§ 5] or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this subchapter," does not apply to suits brought by private litigants seeking a declaratory judgment that a new state enactment is subject to § 5's approval requirements, and these actions may be brought in the local district courts. Pp. 557–560.

4. In light of the extraordinary nature of the Act and its effect on federal-state relationships, and the unique approval requirements of § 5, which also provides that "[a]ny action under this section shall be heard and determined by a court of three judges," disputes involving the coverage of § 5 should be determined by three-judge courts. Pp. 560–563.

5. The state statutes involved in these cases are subject to the approval requirements of § 5. Pp. 563–571.

(a) The Act, which gives a broad interpretation to the right to vote and recognizes that voting includes "all action necessary to make a vote effective," was aimed at the subtle as well as the obvious state regulations which have the effect of denying citizens their right to vote because of race. Pp. 565–566.

(b) The legislative history lends support to the view that Congress intended to reach any enactment which altered the election law of a covered State in even a minor way. Pp. 566–569.

(c) There is no direct conflict between the Court's interpretation of this Act and the principles established by the reapportionment cases, and consideration of any possible conflict should await a concrete case. P. 569.

(d) The enactment in each of these cases constitutes a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" within the meaning of § 5. Pp. 569–571.

6. The Act requires that the State must in some unambiguous and recordable manner submit any legislation or regulation to the Attorney General with a request for his consideration pursuant to the Act, and there is no "submission" when the Attorney General merely becomes aware of the legislation or when briefs are served on him. P. 571.

7. In view of the complexity of these issues of first impression, the lack of deliberate defiance of the Act resulting from the States' failure to submit the enactments for approval, and the fact that the discriminatory purpose or effect of these statutes, if any, has not been judicially determined, this decision has prospective effect only. The States remain subject to the continuing strictures of § 5 until they obtain from the District Court for the District of Columbia a declaratory judgment that for at least five years they have not used the "tests or devices" proscribed by § 4. Pp. 571–572.

No. 3, 268 F. Supp. 218, vacated and remanded. No. 25, 282 F. Supp. 164; No. 26, 281 F. Supp. 918; and No. 36, each reversed and remanded.

Norman C. Amaker argued the cause for appellants in No. 3. With him on the brief were *Jack Greenberg, James M. Nabrit III, Oliver W. Hill, S. W. Tucker, Henry L. Marsh III,* and *Anthony G. Amsterdam. Armand Derfner* and *Elliott C. Lichtman* argued the cause for appellants in Nos. 25, 26, and 36. *Lawrence*

**Henry T. McMILLAN et al.,
Plaintiffs-Appellees,**

v.

**ESCAMBIA COUNTY, FLORIDA et al.,
Defendants-Appellants.**

**Elmer JENKINS et al.,
Plaintiffs-Appellees,**

v.

**CITY OF PENSACOLA et al.,
Defendants-Appellants.**

No. 78-3507.

United States Court of Appeals,
Fifth Circuit.

Feb. 19, 1981.

Plaintiffs, black voters of Pensacola and Escambia County in Florida, brought class actions alleging that the at-large systems for electing members of area's three major governing bodies were unconstitutional. The United States District Court for the Northern District of Florida, Winston E. Arnow, Chief Judge, found such systems to be unconstitutional, and defendants appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) evidence failed to establish that county's at-large system for electing county commissioners was enacted and being maintained for discriminatory purposes; thus, such system was not unconstitutional, and (2) at-large systems for electing school board and city council members were developed with a discriminatory purpose of minimizing voting strength of black community and were being utilized by majority population for such purpose and therefore such systems were unconstitutional.

Affirmed in part and reversed in part.

1. Elections 🔑12

If, in addition to discriminatory impact, a discriminatory purpose exists in enactment or operation of a given electoral system, such system is unconstitutional.

2. Counties 🔑38

Evidence failed to establish that a Florida county's at-large system for electing county commissioners was enacted and being maintained for discriminatory purposes; thus, such system was not unconstitutional. West's F.S.A.Const. Art. 8, § 5.

**3. Municipal Corporations 🔑80
Schools 🔑52**

At-large systems for electing school board and city council members were developed with a discriminatory purpose of minimizing voting strength of black community and were being utilized by majority population for such purpose and therefore such systems were unconstitutional. West's F.S.A. §§ 230.08, 230.10.

4. Elections 🔑12

While there is nothing per se unconstitutional about at-large system of electing local governmental bodies, if purpose of adopting or operating that particular system is invidiously to minimize or cancel out voting potential of racial minorities, and it has that effect, then it is unconstitutional.

Richard I. Lott, County Atty., John W. Flemming, Asst. County Atty., Pensacola, Fla., for Escambia County.

Ray, Patterson & Kievit, Pensacola, Fla., for School Board.

Charles S. Rhyne, William S. Rhyne, Washington, D.C., for all defendants-appellants.

Don J. Canton, City Atty., Pensacola, Fla., for City of Pensacola.

J. U. Blacksher, Larry Menefee, Mobile, Ala., Kent Spriggs, Tallahassee, Fla., Jack Greenberg, Eric Schnapper, New York City, Edward Still, Birmingham, Ala., for plaintiffs-appellees.

Appeals from the United States District Court for the Northern District of Florida.

Before COLEMAN, PECK * and KRAVITCH, Circuit Judges.

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* Senior Circuit Judge of the Sixth Circuit, sitting by designation.

Conclusion

AFM's motion to dismiss the Complaint is granted as to Counts II and III and denied as to Count I. All defendants are hereby ordered to answer Count I of the Complaint on or before June 30, 1981.[16]

APPENDIX

(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this subchapter.

CITY OF PORT ARTHUR, TEXAS, Plaintiff,

v.

UNITED STATES of America, et al., Defendants.

Civ. A. No. 80-0648.

United States District Court,
District of Columbia.

June 12, 1981.

City brought suit to obtain declaration upholding validity of several voting changes occasioned by expansion of boundaries of city, by city's adoption of two new electoral plans for the enlarged community, and by establishment of elected advisory councils for two of the added areas. The Three-Judge District Court, Charles R. Richey, J., held that: (1) city failed to sustain its burden of showing lack of discriminatory purpose behind adoption of either electoral plans for enlarged community, in view of fact that each of the proposed voting plans had a discriminatory effect and both of the plans were adopted for an illicit discriminatory purpose; (2) city's requests for declaration as to validity of ordinances adopting electoral plan and creating advisory councils and preclearance of electoral plans would be denied; and (3) although city acted without illegal, invidious purpose in consolidating two communities and annexing another, approval of territorial expansion would be

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tion. Although AFM has not specified the nature of that notice it does maintain the notice complied with Section 101(a)(3)(B)(i) requirements. This Court of course has no reason to consider that contention now.

[16] Defendant CFM's parallel motion had been stayed pending this Court's ruling on AFM's motion. Because the underlying legal principles are the same, this opinion applies with equal force to dispose of CFM's motion.

withheld until city devised voting plan which satisfied concerns expressed in opinion.

Ordered accordingly.

1. Evidence 🔑48

In Voting Rights Act case, judicial notice would be taken of information contained in 1980 census with the consent of the parties, even though 1980 census was first published after trial. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

2. Judgment 🔑707, 715(3)

Findings concerning racial discrimination in city made in previous suit challenging city's at-large election system were not entitled to collateral estoppel effect in subsequent suit brought by city under Voting Rights Act, where United States did not participate in previous case, four individual plaintiffs in the previous suit were not in privity with the United States, burden of proof in previous suit was precisely the reverse of burden of proof existing in subsequent suit, and there had actually been another previous suit and the results of the two previous suits were inconsistent. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

3. Judgment 🔑634

Essence of collateral estoppel by judgment is that some question or fact in dispute has been judicially and finally determined by a court of competent jurisdiction between the same parties or their privies.

4. Constitutional Law 🔑305(2), 309(1)
Judgment 🔑665

Collateral estoppel doctrine's requirement of identity of parties is justified by ancient doctrine that person cannot be bound by a judgment unless he has had reasonable notice of the claim against him and an opportunity to be heard in opposition to that claim; due process requires no less. U.S.C.A.Const. Amend. 14.

5. Elections 🔑12

Burden fell squarely on city under Voting Rights Act to demonstrate that proposed voting changes did not have discriminatory purpose or effect. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

6. Elections 🔑12

Congress enacted Voting Rights Act to rid the country of racial discrimination in voting. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

7. Elections 🔑12

City of Port Arthur, Texas, was subject to strictures of section 5 of Voting Rights Act. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

8. Elections 🔑12

Political units within covered jurisdictions must comply with preclearance requirements of section 5 of Voting Rights Act. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

9. Elections 🔑12

City's expansion of its boundaries, adoption of two new electoral plans for enlarged community, and establishment of elected advisory councils for two of the added areas came within purview of Voting Rights Act. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

10. Elections 🔑12

In Voting Rights Act case, city had to demonstrate by preponderance of the evidence that proposed standard, practice or procedure did not have the purpose of denying or abridging the right to vote on account of race, color, or linguistic affiliation and that it would not have that effect. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

11. Elections 🔑12

Although city of Port Arthur, Texas, established that principal motives for enlarging its boundaries and creating advisory councils for two consolidated areas were nondiscriminatory, city had failed to sustain its burden of showing lack of discriminatory purpose behind adoption of either "4-4-1" or "8-0-1" electoral plans for the enlarged community, in view of fact that each of the proposed voting plans had a discriminatory effect and both of the plans were adopted for an illicit discriminatory purpose. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

12. Elections ⇐12

Under Voting Rights Act, boundary enlargement which significantly reduces proportion of voters of a particular race will only be refused preclearance under the "effect" test if minority race is denied opportunity to obtain representation reasonably equivalent to its political strength in the enlarged community. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

13. Elections ⇐12
Municipal Corporations ⇐80

Under Voting Rights Act, evidence established that each of the city's proposed voting plans had a discriminatory effect in the context of expanded city, where expansion significantly altered racial balance in the city, the electoral systems proposed by city did not afford black citizens requisite opportunity to achieve representation commensurate with their voting strength in the enlarged community, black and white communities in city had become seriously polarized with respect to voting because of discrimination suffered by black residents for many years and city's plans contributed to diminution of minority voting strength. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

14. Elections ⇐12

In Voting Rights Act case, evidence established that city's establishment of advisory councils to be elected by predominantly white residents of two communities consolidated by city was discriminatory in effect, in view of fact that minority populations in city did not have opportunity to elect advisory representatives. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

15. Elections ⇐12

In Voting Rights Act case, evidence established that city was motivated to adopt electoral plans by impermissible intent, so that even if effect of electoral modifications was entirely legal, implication of discriminatory purpose would have been sufficient reason to prohibit implementation of plans under Act. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

16. Elections ⇐12

In Voting Rights Act case, despite indicia of an original discriminatory purpose, city successfully demonstrated existence of legitimate reasons for expansion of city through annexation and consolidation. Civil Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

17. Elections ⇐12

In Voting Rights Act case, preponderance of the evidence exhibited absence of discriminatory intent involving establishment of advisory councils from predominantly white annexed communities. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

18. Elections ⇐12

In Voting Rights Act case, city failed to establish that electoral plans were not adopted for illicit discriminatory purpose. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

19. Elections ⇐12

In view of city's failure to demonstrate that implementation of voting changes could be accomplished without effect of denying or abridging right to vote on account of race, color or language affiliation and in view of evidence revealing that development of electoral plans proposed by city was infected by discriminatory purpose, city was not entitled to declaration that ordinances adopting plans and creating advisory councils were valid, nor was city entitled to preclearance of electoral plans. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

20. Elections ⇐12

Although city acted without illegal invidious purpose in consolidating two predominantly white communities and annexing another, because expansion of city significantly diluted voting power of black minority and city failed to show that any of the electoral systems which it had adopted assured minority population opportunity to elect representation reasonably equivalent to its electoral strength in the enlarged community, approval of territorial expansion would be withheld until city devised new voting plans satisfying court's concerns. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

21. Elections ⇐12

Although city failed to show that any of the electoral systems which it adopted assured minority population opportunity to elect representation reasonably equivalent to its electoral strength in the enlarged community, preclearance of annexation would not be condition upon adoption of fairly-drawn single-member district plan, but, rather, in order to minimize intrusion of federal court into affairs of city and in view of decision indicating that court was without authority to affect at-large rule directly, city would be permitted to develop electoral system of its own design. Voting Rights Act of 1965, § 5 as amended 42 U.S.C.A. § 1973c.

Robert Q. Keith, Mehaffy, Weber, Keith & Gonsoulin, Beaumont, Tex., for plaintiff, with whom were George Wikoff, City Atty., Port Arthur, Tex., and James D. Welch and Greer S. Goldman, Wald, Harkrader & Ross, Washington, D.C.

J. Gerald Hebert and Robert S. Berman, Attys., U.S. Dept. of Justice, Washington, D.C., for defendant United States of America, with whom were Drew S. Days, Asst. Atty. Gen., and Gerald W. Jones and Paul F. Hancock, Attys., U.S. Dept. of Justice, Washington, D.C.

Elizabeth K. Julian and Michael M. Daniel, East Texas Legal Services, Dallas, Tex., for intervenor-defendants Abraham Douglas, et al., with whom was Norman J. Chachkin, Lawyers' Committee for Civil Rights Under Law, Washington, D.C.

Before J. SKELLY WRIGHT, Circuit Judge, and JOHN LEWIS SMITH, Jr., and CHARLES R. RICHEY, District Judges.

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

This is an action for declaratory relief brought under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (Supp. 1974–1980).[1] Unless a state or political sub-

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[1] Section 5 provides:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)2 of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, stan-

KEYES ET AL. *v.* SCHOOL DISTRICT NO. 1, DENVER, COLORADO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 71-507. Argued October 12, 1972—Decided June 21, 1973

Petitioners sought desegregation of the Park Hill area schools in Denver and, upon securing an order of the District Court directing that relief, expanded their suit to secure desegregation of the remaining schools of the Denver school district, particularly those in the core city area. The District Court denied the further relief, holding that the deliberate racial segregation of the Park Hill schools did not prove a like segregation policy addressed specifically to the core city schools and requiring petitioners to prove *de jure* segregation for each area that they sought to have desegregated. That court nevertheless found that the segregated core city schools were educationally inferior to "white" schools elsewhere in the district and, relying on *Plessy* v. *Ferguson*, 163 U. S. 537, ordered the respondents to provide substantially equal facilities for those schools. This latter relief was reversed by the Court of Appeals, which affirmed the Park Hill ruling and agreed that Park Hill segregation, even though deliberate, proved nothing regarding an overall policy of segregation. *Held:*

1. The District Court, for purposes of defining a "segregated" core city school, erred in not placing Negroes and Hispanos in the same category since both groups suffer the same educational inequities when compared with the treatment afforded Anglo students. Pp. 195–198.

2. The courts below did not apply the correct legal standard in dealing with petitioners' contention that respondent School Board had the policy of deliberately segregating the core city schools. Pp. 198–213.

(a) Proof that the school authorities have pursued an intentional segregative policy in a substantial portion of the school district will support a finding by the trial court of the existence of a dual system, absent a showing that the district is divided into clearly unrelated units. Pp. 201–203.

(b) On remand the District Court should decide initially whether respondent School Board's deliberately segregative policy respecting the Park Hill schools constitutes the whole Denver school district a dual school system. Pp. 204-205.

(c) Where, as in this case, a policy of intentional segregation has been proved with respect to a significant portion of the school system, the burden is on the school authorities (regardless of claims that their "neighborhood school policy" was racially neutral) to prove that their actions as to other segregated schools in the system were not likewise motivated by a segregative intent. Pp. 207-213.

445 F. 2d 990, modified and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a separate opinion, *post*, p. 214. BURGER, C. J., concurred in the result. POWELL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 217. REHNQUIST, J., filed a dissenting opinion, *post*, p. 254. WHITE, J., took no part in the decision of the case.

James M. Nabrit III and *Gordon G. Greiner* argued the cause for petitioners. With them on the brief were *Jack Greenberg, Charles Stephen Ralston, Norman J. Chachkin, Robert T. Connery,* and *Anthony G. Amsterdam.*

William K. Ris argued the cause for respondents. With him on the brief were *Thomas E. Creighton, Benjamin L. Craig,* and *Michael H. Jackson.**

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*Briefs of *amici curiae* urging reversal were filed by *Melvin L. Wulf, Sanford Jay Rosen,* and *Edwin S. Kahn* for the American Civil Liberties Union et al.; by *Stephen J. Pollak, Richard M. Sharp, David Rubin, Larry F. Hobbs,* and *Leonard N. Waldbaum* for the National Education Association et al.; by *Arnold Forster, Paul Hartman, Paul S. Berger, Joseph B. Robison,* and *Samuel Rabinove* for the Anti-Defamation League of B'nai B'rith et al.; and by *Mario G. Obledo* and *Michael Mendelson* for the Mexican American Legal Defense and Educational Fund.

Briefs of *amici curiae* urging affirmance were filed by *Theodore L. Sendak,* Attorney General, *Wendell C. Homacher,* Deputy Attorney General, and *William F. Harvey* for the State of Indiana; by

KATZENBACH, ATTORNEY GENERAL, ET AL. *v.* MORGAN ET UX.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 847. Argued April 18, 1966.—Decided June 13, 1966.*

Appellees, registered voters in New York City, brought this suit to challenge the constitutionality of § 4 (e) of the Voting Rights Act of 1965 to the extent that the provision prohibits enforcement of the statutory requirement for literacy in English as applied to numerous New York City residents from Puerto Rico who, because of that requirement, had previously been denied the right to vote. Section 4 (e) provides that no person who has completed the sixth grade in a public school, or an accredited private school, in Puerto Rico in which the language of instruction was other than English shall be disfranchised for inability to read or write English. A three-judge District Court granted appellees declaratory and injunctive relief, holding that in enacting § 4 (e) Congress had exceeded its powers. *Held:* Section 4 (e) is a proper exercise of the powers under § 5 of the Fourteenth Amendment, and by virtue of the Supremacy Clause, New York's English literacy requirement cannot be enforced to the extent it conflicts with § 4 (e). Pp. 646–658.

(a) Though the States have power to fix voting qualifications, they cannot do so contrary to the Fourteenth Amendment or any other constitutional provision. P. 647.

(b) Congress' power under § 5 of the Fourteenth Amendment to enact legislation prohibiting enforcement of a state law is not limited to situations where the state law has been adjudged to violate the provisions of the Amendment which Congress sought to enforce. It is therefore the Court's task here to determine, not whether New York's English literacy requirement as applied violates the Equal Protection Clause, but whether § 4 (e)'s prohibition against that requirement is "appropriate legislation" to enforce the Clause. *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, distinguished. Pp. 648–650.

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*Together with No. 877, *New York City Board of Elections* v. *Morgan et ux.*, also on appeal from the same court.

(c) Section 5 of the Fourteenth Amendment is a positive grant of legislative power authorizing Congress to exercise its discretion in determining the need for and nature of legislation to secure Fourteenth Amendment guarantees. The test of *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, is to be applied to determine whether a congressional enactment is "appropriate legislation" under § 5 of the Fourteenth Amendment. Pp. 650–651.

(d) Section 4 (e) was enacted to enforce the Equal Protection Clause as a measure to secure nondiscriminatory treatment by government for numerous Puerto Ricans residing in New York, both in the imposition of voting qualifications and the provision or administration of governmental services. Pp. 652–653.

(e) Congress had an adequate basis for deciding that § 4 (e) was plainly adapted to that end. Pp. 653–656.

(f) Section 4 (e) does not itself invidiously discriminate in violation of the Fifth Amendment for failure to extend relief to those educated in non-American flag schools. A reform measure such as § 4 (e) is not invalid because Congress might have gone further than it did and did not eliminate all the evils at the same time. Pp. 656–658.

247 F. Supp. 196, reversed.

Solicitor General Marshall argued the cause for appellants in No. 847. With him on the brief were *Assistant Attorney General Doar, Ralph S. Spritzer, Louis F. Claiborne, St. John Barrett* and *Louis M. Kauder.*

J. Lee Rankin argued the cause for appellant in No. 877. With him on the brief were *Norman Redlich* and *Seymour B. Quel.*

Alfred Avins argued the cause and filed a brief for appellees in both cases.

Rafael Hernandez Colon, Attorney General, argued the cause and filed a brief for the Commonwealth of Puerto Rico, as *amicus curiae,* urging reversal.

Jean M. Coon, Assistant Attorney General, argued the cause for the State of New York, as *amicus curiae,* urging affirmance. With her on the brief were *Louis J. Lefko-*

FORTSON, SECRETARY OF STATE OF GEORGIA v. DORSEY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 178. Argued December 10, 1964.—
Decided January 18, 1965.

Under Georgia's 1962 Senatorial Reapportionment Act the State is divided into senatorial districts that are conceded to be substantially equal in population. Except for the seven most populous counties, from one to eight counties comprise a district and the voters therein, on a district-wide basis, elect the senator for that district. The seven most populous counties are divided into from two to seven districts each and the voters in each such county, instead of electing only one senator from the district in which they reside, elect, on a county-wide basis, that number of senators that the county has districts. Appellees, registered voters in multi-district counties of Georgia, brought this action in the Federal District Court against the Secretary of State and local election officials, seeking a decree that the county-wide voting requirement in the seven multi-district counties violates the Equal Protection Clause of the Fourteenth Amendment. A three-judge District Court granted appellees' motion for summary judgment, holding that the difference between electing senators in districts comprising a county or group of counties and in the multi-district counties constitutes invidious discrimination. *Held:* Equal protection does not necessarily require formation of all single-member districts in a State's legislative apportionment scheme. *Reynolds* v. *Sims*, 377 U. S. 533, followed. Pp. 436–439.

228 F. Supp. 259, reversed.

Paul Rodgers, Assistant Attorney General of Georgia, argued the cause for appellant. With him on the brief was *Eugene Cook,* Attorney General of Georgia.

Edwin F. Hunt argued the cause for appellees. With him on the brief were *William C. O'Kelley* and *Charles A. Moye, Jr.*

WRIGHT ET AL. *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 96. Argued November 19, 1963.—Decided February 17, 1964.

Appellants, voters in the four congressional districts in Manhattan Island, brought suit before a three-judge District Court challenging the constitutionality of part of New York's 1961 congressional apportionment statute. They charged that, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and in violation of the Fifteenth Amendment, irregularly shaped districts were drawn with racial considerations in mind, resulting in one district which excluded non-white citizens and those of Puerto Rican origin, who were largely concentrated in one of the other districts. *Held:* Finding of District Court that appellants had failed to show that the challenged part of the apportionment act was a "state contrivance" to segregate on the basis of race or place of origin, that the New York Legislature was motivated by racial considerations or that, in fact, it drew the districts on racial lines was not clearly erroneous. Pp. 53–58.

(a) Where the evidence was "equally, or more, persuasive" that racial considerations had not motivated the State Legislature than that such considerations had motivated the Legislature, the findings of the District Court that the appellants had failed to prove their case will not be disturbed. Pp. 56–57.

(b) The high concentration in one area of colored and Puerto Rican voters made it difficult to draw districts to approximate an equal division of these groups among the districts, even assuming that to be permissible. P. 57.

211 F. Supp. 460, affirmed.

Justin N. Feldman argued the cause for appellants. With him on the briefs were *Jerome T. Orans* and *Elsie M. Quinlan.*

Irving Galt, Assistant Solicitor General of New York, and *Jawn A. Sandifer* argued the cause for appellees. With *Mr. Galt* on the brief for appellees Rockefeller et al.

GOMILLION ET AL. *v.* LIGHTFOOT, MAYOR OF TUSKEGEE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 32. Argued October 18–19, 1960.—Decided November 14, 1960.

Negro citizens sued in a Federal District Court in Alabama for a declaratory judgment that an Act of the State Legislature changing the boundaries of the City of Tuskegee is unconstitutional and for an injunction against its enforcement. They alleged that the Act alters the shape of Tuskegee from a square to an irregular 28-sided figure; that it would eliminate from the City all but four or five of its 400 Negro voters without eliminating any white voter; and that its effect was to deprive Negroes of their right to vote in Tuskegee elections on account of their race. The District Court dismissed the complaint, on the ground that it had no authority to declare the Act invalid or to change any boundaries of municipal corporations fixed by the State Legislature. *Held:* It erred in doing so, since the allegations, if proven, would establish that the inevitable effect of the Act would be to deprive Negroes of their right to vote on account of their race, contrary to the Fifteenth Amendment. Pp. 340–348.

(a) Even the broad power of a State to fix the boundaries of its municipalities is limited by the Fifteenth Amendment, which forbids a State to deprive any citizen of the right to vote because of his race. *Hunter* v. *Pittsburgh*, 207 U. S. 161, and related cases distinguished. Pp. 342–345.

(b) A state statute which is alleged to have the inevitable effect of depriving Negroes of their right to vote in Tuskegee because of their race is not immune to attack simply because the mechanism employed by the Legislature is a "political" redefinition of municipal boundaries. *Colegrove* v. *Green*, 328 U. S. 549, distinguished. Pp. 346–348.

270 F. 2d 594, reversed.

Fred D. Gray and *Robert L. Carter* argued the cause for petitioners. With them on the brief was *Arthur D. Shores.*

[1] Zapata argues that this case is controlled by *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955 (5 Cir. 1974), which held that a clause directing that the parties "must submit to the jurisdiction of the court of New York" was not a mandatory forum selection clause. *Keaty*, however, teaches another principle which is equally forceful as a rule of interpretation—that when a contract provision is subject to opposing, yet reasonable interpretation, an interpretation is preferred which operates more strongly against the party from whom the words proceeded. *Id.* at 957.

[2] The district court found as a fact that the parties agreed to suit in Great Britain. That finding is not clearly erroneous. Zapata not only proposed the forum in a strongly-worded telegram following the sea accident, but it thereafter instigated litigation in the London courts. Now Zapata claims that it did not regard that jurisdiction as exclusive nor could FINNTRADER'S owners have so regarded it. We disagree. Whether we view this case from the vantage point of traditional contract analysis or from that of the purpose of forum selection clauses generally, we reach the same result. With respect to contract analysis, even if we were to assume that Zapata meant for its telegram to convey a proposal for non-exclusive jurisdiction, we have no reason to believe that FINNLINES either knew or had reason to know of that meaning. *See* 3 A. Corbin, Contracts § 537 (1960). With regard to the forum selection problem, we note that FINNTRADER'S owners had two choices when they received Zapata's telegram. They could either consent to English jurisdiction or chance that one of their ships would be arrested in other, wholly fortuitous jurisdiction. In either case unless Zapata is held to its own selection of a forum, any choice it held out to FINNLINES is wholly illusory.

We need not decide whether the principles enunciated by the Supreme Court in M/S BREMEN, *supra*, are applicable in all post-accident negotiations. We hold only that on the facts and circumstances of this case neither principles of contract interpretation nor those of any other argument advanced by Zapata prevented the district court's dismissal. We find no error in that court's opinion and order that it be AFFIRMED.

Reverend Charles H. NEVETT et al., Individually and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

Lawrence G. SIDES, Individually and in his capacity as Mayor of Fairfield, Alabama, et al., etc., Defendants-Appellees.

No. 76-2951.

United States Court of Appeals,
Fifth Circuit.

March 29, 1978.

Rehearing and Rehearing En Banc
Denied May 25, 1978.

Black residents of Fairfield, Alabama, brought suit challenging the constitutionality of municipal election system providing for at-large selection of the city council president and councilmen. The United States District Court for the Northern District of Alabama, at Birmingham, Sam C. Pointer, Jr., J., entered a judgment from which all parties appealed. The Court of Appeals, 533 F.2d 1361, vacated and remanded for failure to apply properly the voting dilution standards set forth in *Zimmer.* Upon remand, the District Court entered judgment for defendants, and plaintiffs appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) a showing of racially motivated discrimination is a necessary element in an equal protection voting dilution claim; (2) illicit motivation is also a prerequisite to a successful claim under the Fifteenth Amendment; (3) the lower court's factual determinations under *Zimmer*, viz., that blacks were not denied access to the electoral processes, that city officials, were not unresponsive to the needs of black residents, and that blacks were not precluded from effective participation in the election system by any past discrimination, were not clearly erroneous, and (4) the existence of a tenuous state policy behind at-large districting, even when "enhanced" by two or possibly three of the "extra" factors delineated in *Zimmer*, were insufficient in the aggregate to establish a case of voting dilution.

Affirmed.

Wisdom, Circuit Judge, filed a specially concurring opinion.

1. Municipal Corporations 🔑80

Issue in a typical reapportionment case is whether population deviations from the average district are impermissibly large; the comparison is one based purely on population figures, and no showing of discrimination along racial, ethnic, or political lines need be shown.

2. Constitutional Law 🔑225.3(1)

A case alleging violation of the one person, one vote standard, based solely on a mathematical analysis, may properly be called a "quantitative" reapportionment case.

3. Municipal Corporations 🔑80

That an apportionment scheme satisfies the quantitative standard does not insure equality in all the aspects of political representation.

4. Municipal Corporations 🔑80

"Qualitative" reapportionment cases are those which focus "not on population-based apportionment but on the quality of representation."

5. Elections 🔑12

The Constitution does not demand that each cognizable element of a constituency elect representatives in proportion to its voting strength; even consistent defeat of a group's candidates, standing alone, does not cross constitutional bounds.

6. Elections 🔑12

The issue in voting dilution cases is not whether a given group elects a minimum number of candidates, and the standards are not different when the interest binding the group is one of race.

7. Elections 🔑12

It is not enough that a racial group allegedly discriminated against by at-large districting has not had legislative seats in proportion to its voting potential; rather, in the absence of evidence that the at-large provisions themselves were conceived or operated as purposeful devices to further racial discrimination, the inquiry becomes one of determining whether the influence of a given racial group has been distorted because its members have been denied equal access to political processes such as party nominating procedures, registration, and voting.

8. Constitutional Law 🔑215

Where official action is racially neutral on its face, courts must adhere to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.

9. Constitutional Law 🔑215

Intent is a prerequisite of universal applicability to Fourteenth Amendment claims of racial discrimination. U.S.C.A. Const. Amend. 14.

10. Elections 🔑12

A showing of intent is a necessary element in a case alleging a racial gerrymander.

11. Constitutional Law 🔑215.3

That a districting scheme is motivated by racial consideration does not necessarily render it subject to invalidation under the equal protection clause. U.S.C.A.Const. Amend. 14.

12. Elections 🔑12

A districting body may properly consider race if the plan does not slur or stigmatize any race and does not fence out a racial group from participation in political processes or minimize or unfairly cancel out such a group's voting strength. U.S.C.A. Const. Amend. 14.

13. Elections ⇨12

Although a benign districting plan, which is designed to remedy the underrepresentation of a racial minority group, is permissible under the Constitution, a state or locality is under no obligation to provide minorities, racial or otherwise, with representation proportionate to their voting power. U.S.C.A.Const. Amend. 14.

14. Constitutional Law ⇨215.3

A showing of racially motivated discrimination is a necessary element in an equal protection voting dilution claim. U.S.C.A.Const. Amend. 14.

15. Elections ⇨12

Illicit motivation is a prerequisite in a voting dilution case to a successful claim under the Fifteenth Amendment. U.S.C.A. Const. Amend. 15.

16. Elections ⇨12

Fifteenth Amendment protects the rights of blacks to participate at all levels of the political process and interdicts all methods demonstrably contrived to diminish this participation. U.S.C.A.Const. Amend. 15.

17. Elections ⇨12

A showing of racially motivated official action that infringes the right to vote is sufficient to state a cause of action under the Fifteenth Amendment. U.S.C.A.Const. Amend. 15.

18. Elections ⇨12

An electoral plan, racially neutral at its adoption, may further preexisting intentional discrimination or may be maintained for invidious purposes.

19. Elections ⇨12

Whether invidious discrimination motivates the adoption or maintenance of a districting scheme or whether the plan furthers preexisting purposeful discrimination, the intent requirement may be satisfied by direct or circumstantial evidence.

20. Elections ⇨12

At-large elections are not unconstitutional merely because fewer minority candidates are elected, due to polarized voting, than would correspond to the minority's portion of the district population.

21. Elections ⇨12

Where evidence of discriminatory intent is lacking in the enacting processes, the criteria of *Zimmer*, in which the Fifth Circuit enunciated a set of factors that, when established in the aggregate, are probative of unconstitutional voting dilution, become acutely relevant; they may demonstrate that the neutral districting plan is in fact an "instrumentality for carrying forward patterns of purposeful and intentional discrimination." U.S.C.A.Const. Amend. 14.

22. Elections ⇨12

Where a remotely enacted districting plan, which was adopted without racial motivations, is maintained with the purpose of excluding minority input, the necessary discriminatory intent is established and the plan is unconstitutional. U.S.C.A.Const. Amend. 14.

23. Elections ⇨12

When bloc voting has been demonstrated, a showing under *Zimmer* that the governing body is unresponsive to minority needs is strongly corroborative of an intentional exploitation of the electorate's bias, and the likelihood of an intentional exploitation is "enhanced" by the existence of systemic devices such as a majority vote requirement, an antisingle shot provision, and the lack of a requirement that representatives reside in subdistricts.

24. Elections ⇨12

If elected representatives are unresponsive to the needs of a racial group apparently because some stages of the electoral process diminish the group's input, the inference that the processes are maintained with the purpose to discriminate can fairly be drawn.

25. Municipal Corporations ⇨80

A tenuous state policy in favor of at-large districting may constitute evidence that other, improper motivations lay behind the enactment or maintenance of the districting plan.

26. Municipal Corporations ⇐80

Although state statutes generally need satisfy only minimum rationality requirements, the weight of the state policy behind an at-large districting plan is an evidentiary consideration that must be considered along with all other relevant evidence to determine whether the plan is improperly motivated. Code of Ala., Tit. 37, § 426; U.S.C.A.Const. Amend. 14.

27. Elections ⇐12

That the finder of fact determines the plaintiff has prevailed under one or even several of the *Zimmer* criteria may not establish the existence of intentional discrimination in the enactment of an at-large districting plan; the evidence under the other criteria may weigh so heavily in favor of the defendant that the evidence as a whole will not bear an inference of invidious discrimination. U.S.C.A.Const. Amend. 14.

28. Elections ⇐12

A finding of voting dilution under *Zimmer* raises an inference of intentional discrimination in the enactment of an at-large districting plan.

29. Federal Courts ⇐855

In suit brought by black residents of Fairfield, Alabama, challenging the constitutionality of municipal election system providing for at-large selection of the city council president and councilmen, the district court's determinations under the *Zimmer* criteria would stand, if supported by sufficient evidence, unless clearly erroneous. Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

30. Constitutional Law ⇐215.3

Ultimate issue in a case alleging unconstitutional dilution of the votes of a racial group is whether the districting plan under attack exists because it was intended to diminish or dilute the political efficacy of that group. U.S.C.A.Const. Amend. 14.

31. Federal Courts ⇐855

In suit brought by black residents of Fairfield, Alabama, challenging the constitutionality of municipal elections providing for at-large selection of the city council president and councilmen, the district court's factual determinations under *Zimmer*, viz., that blacks were not denied access to the electoral processes, that city officials were not unresponsive to the needs of black residents, and that blacks were not precluded from effective participation in the election system by any past discrimination, were not clearly erroneous. U.S.C.A.Const. Amend. 14; Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

32. Municipal Corporations ⇐80

In suit brought by black residents of Fairfield, Alabama, challenging the constitutionality of municipal election system providing for at-large selection of the city council president and councilmen, the existence of a tenuous state policy behind at-large districting, even when "enhanced" by two or possibly three of the "extra" factors delineated in *Zimmer*, were insufficient in the aggregate to establish a case of voting dilution. Code of Ala., Tit. 37, § 426; U.S.C.A.Const. Amend. 14.

33. Elections ⇐12

In the absence of other evidence indicating the existence of intentional discrimination, state enactments providing for at-large districting are entitled to the deference afforded any other statute: their means need only be reasonably related to ends properly within state cognizance. Code of Ala., Tit. 37, § 426.

34. Municipal Corporations ⇐80

At-large districting is not per se unconstitutional. Code of Ala., Tit. 37, § 426; U.S.C.A.Const. Amend. 14.

William M. Dawson, Jr., Edward Still, Birmingham, Ala., Laughlin McDonald, ACLU Foundation, Neil Bradley, Atlanta, Ga., for plaintiffs-appellants.

Jim Ward, Asst. Atty. Gen., Montgomery, Ala., for Baxley, indiv. & as Atty. Gen.

confessions were not the result of coercion and that he suffered no violation of his constitutional rights in the admission of his codefendant's confession in view of the overwhelming evidence against him.

Affirmed.

William DOVE, Sr., et al., Appellants,

v.

Charles E. MOORE et al., Appellees.

No. 75-1918.

United States Court of Appeals,
Eighth Circuit.

Submitted May 13, 1976.

Decided July 27, 1976.

Black residents of city brought action attacking at-large system of electing city councilmen. After judgment of three-judge District Court, 364 F.Supp. 407, dismissing complaint challenging state statute was affirmed, case was remanded for consideration by single judge. The United States District Court for the Eastern District of Arkansas, Oren Harris, J., upheld city's system, and plaintiffs appealed. The Court of Appeals, Bright, Circuit Judge, held that at-large system was not unconstitutional in light of record demonstrating that blacks played an active and significant role in city politics.

Affirmed.

1. Municipal Corporations 🔑80

Objectionable features of at-large elections or multimember districts do not render an at-large system unconstitutional per se; the constitutional touchstone is whether the system is open to full minority participation, not whether proportional representation is in fact achieved.

2. Municipal Corporations 🔑80

At-large system of electing city councilmen was not unconstitutional where black residents of city, having about 40% of the votes, had full, open and equal access to the city's political processes and the record demonstrated that they played an active and significant role in city politics.

Charles E. Williams, III, New York City, George Howard, Jr., Pine Bluff, Ark., for appellants; Jack Greenberg, New York City, on brief.

John A. Davis, Bridges, Young, Matthews & Davis, Michael R. Dennis, City Atty., Pine Bluff, Ark., for appellees.

Before BRIGHT and WEBSTER, Circuit Judges, and TALBOT SMITH, Senior District Judge.*

BRIGHT, Circuit Judge.

In this class action brought by four black residents of Pine Bluff, Arkansas, on behalf of all black voters of that city, William Dove, Sr. and other plaintiffs-appellants attack Pine Bluff's system of electing all eight members of the city council at-large rather than from single-member wards. Plaintiffs-appellants allege that the at-large system operates to discriminate against blacks by diluting their voting power, and, thus, precluding blacks from achieving representation on the city council in proportion to their race. We reject the contentions of the plaintiffs-appellants and affirm the judgment of the district court which determined that Pine Bluff's at-large system meets constitutional standards.

This case has a convoluted history.[1] The facts are detailed in the reported decisions cited in note 1 *supra*, and need not be set out at length here. Briefly, they may be stated as follows.

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* TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

[1] The litigation was initially filed in December of 1968. It purported to attack an Arkansas statute of statewide application requiring cities of the size of Pine Bluff to utilize an at-large

Charles F. ZIMMER, Plaintiff,
Stewart Marshall, Intervenor-Appellant,
v.
John J. McKEITHEN et al.,
Defendants-Appellees.
No. 71-2649.

United States Court of Appeals,
Fifth Circuit.

Sept. 12, 1973.

Action for reapportionment of school board and police juries in Louisiana Parish. The United States District Court for the Western District of Louisiana, Benjamin C. Dawkins, Jr., Chief Judge, ordered at-large elections, and plaintiffs appealed. The Court of Appeals, 467 F.2d 1381, affirmed. On rehearing en banc, the Court of Appeals, Gewin, Circuit Judge, held that although population is the proper measure of equality in apportionment, access to the political process and not population is the barometer of dilution of minority voting strength and that repudiation of at-large elections for police jury and school board would be justified in view of confluence of factors, including past racial discrimination, supporting contention that at-large electoral scheme would have worked a diminution of black voting strength, and that fact that three black candidates had been successful in immediately preceding election did not dictate finding that at-large scheme did not in fact dilute black vote.

Panel decision reversed; judgment of district court vacated and cause remanded.

Coleman, Circuit Judge, dissented in part and filed opinion in which Ingraham, Circuit Judge, joined.

Clark, Circuit Judge, dissented and filed opinion in which Dyer, Morgan and Roney, Circuit Judges, joined.

1. Counties ⇐38

The dilution standard, i. e., whether an apportionment scheme operates to minimize or cancel out voting strength of racial or political elements of the voting population, is a viable means of reconciling the disparate treatment of governmental body approved apportionment plans and court-approved plans under Voting Rights Act of 1965. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

2. Elections ⇐12

Provision of Voting Rights Act of 1965 governing alteration of voting qualifications and procedures by subject state or political subdivisions covers attempts to administer voting practices as well as attempts to enact them. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

3. Constitutional Law ⇐225(1)

Concept of population in fair representation cases is not possessed of any talismanic quality; to rely on population statistics, to exclusion of all other factors, is to give such statistics greater sanctity than that which the law permits or requires. U.S.C.A.Const. Amends. 14, 15.

4. Constitutional Law ⇐225(1)

Inherent in concept of fair representation are two propositions: first, that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable and second, that assuming substantial equality, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population. U.S. C.A.Const. Amends. 14, 15.

5. Constitutional Law ⇐225(1)

Although population is the proper measure of equality in apportionment, access to the political process and not population is not the barometer of dilution of minority voting strength. U.S. C.A.Const. Amends. 14, 15.

6. Counties ⇐38

Legal standards for determining submergence of voting strength of racial elements of the voting population admit of no distinction on basis of size of population alone; preference for single-member districts in large districts is of no moment where a showing of dilution has been made. U.S.C.A.Const. Amends. 14, 15.

7. Constitutional Law ⇐215

Minorities are not to be exposed and subject to apportionment schemes otherwise constitutionally infirm because the equal protection clause can be watered down on the basis of population statistics alone. U.S.C.A.Const. Amends. 14, 15.

8. Constitutional Law ⇐225(1)

Elections with respect to certain special governmental units of limited purpose are not subject to the fair representation mandates. U.S.C.A.Const. Amends. 14, 15.

9. Constitutional Law ⇐215

To establish existence of a constitutionally impermissible redistricting plan, the plaintiff must maintain the burden of showing either first, a racially motivated gerrymander, or a plan drawn along racial lines, or second, that, designedly or otherwise, an apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. U.S.C.A.Const. Amends. 14, 15.

10. Counties ⇐38

A reapportionment plan may not be invalidated solely because of the racial motivations of those who fashioned it; focus is on actual effect of the legislation being challenged and not the reason why the legislation was enacted. U.S.C.A.Const. Amends. 14, 15.

11. Constitutional Law ⇐225(1)

At-large and multimember districting schemes are not per se unconstitutional; nevertheless, where a petitioner can demonstrate that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice, such districting schemes are constitutionally infirm. U.S.C.A. Const. Amends. 14, 15.

12. Constitutional Law ⇐215

It is not enough, to establish dilution of voting strength of racial or political elements by use of at-large and multimember districting schemes, to prove a mere disparity between the number of minority residents and the number of minority representatives. U.S.C.A.Const. Amends. 14, 15.

13. Constitutional Law ⇐215

Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that use of a multimember districting scheme is rooted in a strong state policy divorced from maintenance of racial discrimination, a holding of no dilution of minority voting strength is required; however, such a holding is not mandated where the state policy favoring multimember or at-large districting schemes is rooted in racial discrimination. U.S. C.A.Const. Amends. 14, 15.

14. Constitutional Law ⇐215

Where a minority can demonstrate a lack of access to the process of slating candidates, unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multimember or at-large districting, or that existence of past discrimination in general precludes the effective participation in the election system, a strong case of dilution of voting strength has been made. U.S.C.A.Const. Amends. 14, 15.

15. Constitutional Law ⇐215

Standards governing dilution of voting strength of racial or political elements of voting population by use of at-large or multimember districting scheme are applicable whether it is specific law or a custom or practice which causes the diminution of minority voting strength. U.S.C.A.Const. Amends. 14, 15.

16. Constitutional Law ⇐215

Proof of dilution of minority voting strength by use of at-large and multimember districting scheme is enhanced by a showing of existence of large districts, majority vote requirements, anti-single shot voting provisions and lack of provision for at-large candidates running from particular geographical subdistricts; fact of dilution is established on proof of existence of aggregate of such factors; however, all such factors need not be proved in order to obtain relief. U.S.C.A.Const. Amends. 14, 15.

17. Counties 🔑38
Schools and School Districts 🔑52

Repudiation of at-large elections for police juries and school board members was warranted where minority residents had suffered from protracted history of racial discrimination touching their ability to participate in electoral process, for years they had been compelled by statute of statewide application to attend racially segregated schools, voters had been subject to statewide interpretation test to qualify to vote and for 40 years no blacks had been permitted to register to vote; removal of such impediments did not vitiate significance of showing of past discrimination since debilitating effects thereof persisted, particularly in fact that although blacks comprised a majority of population they constituted a minority of registered voters. U.S.C.A.Const. Amends. 14, 15.

18. Counties 🔑38
Schools and School Districts 🔑52

Absence of proof that representatives of police juries and school boards in parish were particularly insensitive to interests of minority residents was significant but not decisive of dilution of minority voting strength by at-large election of police juries and school board. U.S.C.A.Const. Amends. 14, 15.

19. Counties 🔑38
Schools and School Districts 🔑52

Fact that three black candidates had been successful in at-large election of parish police jurors and school board did not require finding that the at-large plan did not dilute black vote where results of election were not before district court when it rendered reapportionment opinion; also, success of black candidates at polls did not necessarily foreclose possibility of dilution of the black vote since such success might be attributable to work of politicians apprehending that support of black candidate would be politically expedient or that election of black candidate would thwart successful challenges to electoral schemes on dilution grounds. U.S.C.A. Const. Amends. 14, 15.

20. Appeal and Error 🔑169

An appellate court cannot take cognizance of matters not passed on by the trial court.

21. Constitutional Law 🔑215

To hold that a minority candidate's success at the polls is conclusive proof of minority group's access to the political process would be inviting attempts to circumvent the Constitution; showing of such success is not conclusive in a reapportionment case; rather, independent consideration of record is required. U.S.C.A.Const. Amends. 14, 15.

22. Counties 🔑38

Where district court reapportionment plan approving at-large elections is challenged merely as an abuse of discretion, starting point of Court of Appeals is pronouncement of United States Supreme Court that single-member districts are preferable to large multimember districts; such preference is not, however, an unyielding one. U.S.C.A. Const. Amends. 14, 15.

23. Counties 🔑38

Preference for single-member election district may yield in two situations: first, where a district court determines that significant interests would be advanced by use of multimember districts and use of single-member districts would jeopardize constitutional requirements; however, those significant interests must not themselves be rooted in racial discrimination and, second, where a district court determines that multimember districts afford minorities a greater opportunity for participation in the political processes than do single-member districts; in process of making the latter determination, a court need not be oblivious to the existence and location of minority voting strength. U.S.C.A.Const. Amends. 14, 15.

24. Counties 🔑38

It is permissible for a federal court to consider race in exercising its broad equitable powers to fashion a reapportionment decree. U.S.C.A.Const. Amends. 14, 15.

25. Counties 🔑38

While not required to formulate a reapportionment plan that assures success of a minority at the polls, a court may in its discretion opt for a multimember plan which enhances the opportunity for participation in the political processes. U.S.C.A.Const. Amends. 14, 15.

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Stanley A. Halpin, Jr., Debra A. Millenson, George M. Strickler, Jr., New Orleans, La., for intervenor-appellant.

Frank R. Parker, Lawyers' Committee for Civil Rights Under Law, George Peach Taylor, Jackson, Miss., David Tatel, Lawyers' Comm., for Civil Rights Under Law, Washington, D. C., for amicus curiae.

William J. Guste, Jr., Atty. Gen. of La., Baton Rouge, La., William B. Ragland, Jr., Lake Providence, La., for defendants-appellees.

Before JOHN R. BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

GEWIN, Circuit Judge:

Aristotle has written:

> If liberty and equality, as is thought by some, are chiefly to be founded in democracy, they will be best attained when all persons alike share in the government to the utmost.[1]

This case evokes a consideration of the extent to which the Constitution of the United States compels adherence to this principle. Specifically, we are called upon to determine under what circumstances an apportionment scheme operates to minimize or cancel out the voting strength of racial or political elements of the voting population.[2] Appellant contends that the district court order, affirmed by a majority of a panel of this court, 467 F.2d 1381, requiring reapportionment for the school board and police juries in East Carroll Parish[3] under an at-large scheme of elections cannot pass muster under the aforementioned standard. Both the district court and a majority of a panel of this court held that an at-large scheme cannot work a dilution of black voting strength where blacks, though constituting a minority of registered voters, comprise a majority of the total population of the parish.[4] Upon rehearing en banc, this court finds the aforementioned conclusion infirm, and therefore we vacate and remand the district court's judgment.

I.

The panel opinion, recounting the facts which spawned this litigation and the protracted proceedings which it entailed, obviates the need for a full exposition of the present posture of this

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[1] Aristotle, Politics, Book II.

[2] White v. Regester, 412 U.S. 755, 765, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314, 324 (1973); Whitcomb v. Chavis, 403 U.S. 124, 143, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); Fortson v. Dorsey, 379 U.S. 433, 439, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965); Burns v. Richardson, 384 U.S. 73, 88, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966).

[3] In the absence of special legislative authority for school boards to apportion, the apportionment and reapportionment of parish school boards is dependent upon such apportionment of the police jury in the parish. Consequently, this case does not require a distinction between the reapportionment scheme as it affects either body.

[4] As shall be discussed *infra*, a majority of the panel refrained from announcing a per se rule. Rather, it qualified its application of the majority of population standards on the grounds proffered by appellees, namely the size of the parish.

SUMMARY OF SOME KEY VOTING RIGHTS ACT DECISIONS

I. CONSTITUTIONALITY

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966).

In an opinion by Chief Justice Warren, the Supreme Court held the original provisions of the 1965 Voting Rights Act to be a constitutionally permissible method of protecting the right to vote. The Court upheld the preclearance provisions of Section 5 under the rationale that "exceptional conditions can justify legislative measures not otherwise appropriate." *Id.* at 334. Because Congress had found from its own evidentiary investigation that "unique circumstances" existed in the covered jurisdictions, the preclearance provisions were held justified. *Id.* at 335. Justice Black dissented on the Section 5 issues.

Katzenbach v. *Morgan*, 384 U.S. 641 (1966).

In an opinion by Justice Brennan, the Supreme Court upheld Section 4(e) of the 1965 Act which provided that certain persons educated in Spanish in Puerto Rican schools would not have to comply with the literacy tests imposed by certain states as a precondition to voting. This provision rendered New York literacy tests invalid as applied to those persons. The Court held that this step was within the power of Congress under Section 5 of the Fourteenth Amendment to enforce that Amendment's guarantee of equal protection of the laws, even though a court might not have held that the New York law was unconstitutional. The only question to be determined by the Court was whether Congress had a reasonable basis for its conclusion that such action might be necessary to protect minority rights. Justices Harlan and Stewart dissented, arguing that Congress had no right to strike down a state statute unless a court would have found that statute unconstitutional.

City of Rome v. *United States*, 446 U.S. 156 (1980).

In an opinion by Justice Marshall, the Supreme Court held that a political subdivision within a covered state could not bail out under Section 4(a) independently from the state itself, even though that subdivision had proven that it had not been guilty of discrimination for the previous seventeen years. The Court also held that where exceptional circumstances exist Congress had the power under Section 2 of the Fifteenth Amendment to prohibit practices that have only disparate racial impact with no discriminatory intent. In dissent, Justice Powell said that the Act should be interpreted to permit subdivisions to bail out from the preclearance requirements even though the state itself could not bail out. Justice Powell went on to say that in the absence of an independent bailout, Section 5 of the Act would be unconstitutional. Justices Rehnquist and Stewart concluded in dissent that Congress does not have the power under Section 2 of the Fifteenth Amendment to prohibit practices having only a disparate racial impact where the governmental unit had affirmatively proven that it had not been guilty of any discriminatory intent for a period of seventeen years. The majority also held that the city had not carried its burden of proving that certain annexations and electoral changes did not have a disadvantageous effect on minority voters.

II. JURISDICTIONS COVERED UNDER SECTION 5

United States v. *Board of Commissioners*, 435 U.S. 110 (1978).

In an opinion by Justice Brennan, the Supreme Court held that all governmental units within a covered jurisdictions were required to submit all covered changes under Section 5 of the Voting Rights Act. The Court rejected arguments that only states and "political subdivisions" were required under Section 5 to make submissions, and that Section 4(c)(2) defined political subdivisions to include only those governmental units which register voters, and not those which do not. In dissent, Chief Justice Burger and Justices Stevens and Rehnquist concluded that only those governmental units which meet the definition of political subdivisions should be required to submit changes. In separate concurrences, Justices Blackmun and Powell expressed reservations as to the correctness of the decision, but believed it to be compelled by *Allen*. Justice Blackmun also remarked that he considered Congressional action in 1970 and 1975 to have been an endorsement of the *Allen* rule.

Gaston County v. *United States*, 395 U.S. 285 (1969).

In an opinion by Justice Harlan, the Supreme Court held that Gaston County, North Carolina, had met the criteria for bailout in Section 4(a) of the Act in that it had not proven that its literacy tests had not been used with either the purpose or effect of denying or abridging the right to vote on the grounds of race. The Court affirmed a finding of the district court that the county's previous maintenance of a segregated school system had resulted in inferior education for its black citizens. The inability of many blacks to pass the literacy tests was a result of this prior discrimination, and the test therefore had the effect of denying or abridging their right to vote because of racial discrimination. Justice Black dissented because of his view that the preclearance provisions of the Act were unconstitutional.

City of Rome v. *United States* (See I above).

III. CHANGES UNDER SECTION 5

Allen v. *State Board of Elections*, 393 U.S. 544 (1969).

In an opinion by Chief Justice Warren, the Supreme Court held that private litigants could bring suit before a three-judge district court in their local districts to argue that state laws had not been precleared under Section 5. The Court held that the preclearance provisions were applicable, not only to changes in laws directly affecting registration and voting, but all changes "which alter the election law of a covered State in even a minor way." *Id.* at 566. The Court specifically held that the change from a district system to an at large system was covered, as was the changing of a particular office from elective to appointive. Also covered were changes in procedures for qualifications of independent candidates and for casting write in votes. Justice Harlan dissented, concluding that Section 5 covered only "those states laws that change either voter qualifications or the manner in which elections are conducted." *Id.* at 591. Justice Black again dissented because of his conviction that Section 5 was altogether unconstitutional.

Perkins v. *Matthews*, 400 U.S. (1971).

In an opinion by Justice Brennan, the Supreme Court held that a local Federal district court was without jurisdiction to determine whether or not a particular change had the purpose or effect of denying or abridging the right to vote. Rather, the only function of a local court was to determine whether or not the change is subject to preclearance under Section 5 of the Act. The Court went on to hold that the municipal annexations and changes in locations of polling places must be precleared. Chief Justice Burger and Justice Blackmun separately concurred under the authority of *Allen*. Justices Black and Harlan dissented on the basis of their opinions in *Allen*.

Georgia v. *United States*, 411 U.S. 526 (1973).

In an opinion by Justice Stewart, the Supreme Court concluded that legislative reapportionments must be precleared under Section 5. The Court also held that the Attorney General could object to a submission even though he could not conclude that a change had either the purpose or effect of denying or abridging the right to vote. The Attorney General could validly place the burden of proof on the submitting jurisdiction, and could interpose an objection whenever that jurisdiction failed to prove that a change did not have such a purpose or effect. Chief Justice Burger concurred, while reiterating his reservations about *Allen*. Justices White, Powell, and Rehnquist dissented on the grounds that the Attorney General should not put the burden of proof on the submitting jurisdictions.

IV. MUNICIPAL ANNEXATIONS UNDER SECTION 5

City of Petersburg v. *United States*, 410 U.S. 962 (1973).

The Supreme Court wrote no opinion but summarily affirmed a judgment of the district court finding that Petersburg's annexation of a predominantly white area could not be approved under Section 5 because it would have the purpose or effect of denying or abridging the right to vote on the basis of race. The district court also ordered that the annexation could be permitted if the at large government of the city were to be changed to a council of single member districts. This is one of only two cases in which the Supreme Court has found a municipal annexation to be in violation of Section 5. The result in this case was later explained by a majority of the Court in an opinion by Justice White in *City of*

Richmond v. *United States*, 422 U.S. 358 (1975). The Court explained that the annexation of the white area coupled with an at large form of government tended "to exclude Negroes totally from participation in the governing of the city through membership on the city council." *Id.* at 370. This effect could be cured by the establishment of a ward system which would afford them representation "reasonably equivalent to their political strength in the enlarged community" *Ibid.* The Court specifically noted that the mere fact that the blacks made up a smaller percentage of the city after the annexation did not amount to a violation of the Act.

City of Richmond v. *United States*, 422 U.S. 358 (1975).

In an opinion by Justice White, the Court applied the same test it had applied without an opinion in the *Petersburg case.* The district court had disapproved an application by Richmond to annex white areas while changing to the single member system. The Court did not have occasion to rule as to whether the annexation standing alone would have constituted a violation of the Act, but it reversed the district court and remanded for reconsideration in light of its explanation of the *Petersburg* case. In dissent, Justices Brennan, Douglas, and Marshall concluded that the annexation had been motivated by discriminatory purpose. Moreover, they felt that by reducing the percentage of blacks in the city of Richmond, the annexation had the effect of denying or abridging the right to vote.

City of Rome v. *United States* (See I above).

V. SCOPE OF SECTION 2

City of Mobile v. *Bolden*, 446 U.S. 55 (1980).

In this case, the district court had found that Mobile's election of its city government at large had the effect of discriminating against black voters, and it ordered a new governing board be created consisting of a mayor and a city council with members elected from single member districts. The Supreme Court reversed, but there was no majority opinion. In an opinion joined by Chief Justice Burger and Justice Powell and Rehnquist, Justice Stewart concluded that Section 2 of the Voting Rights Act had the same meaning as the Fifteenth Amendment itself, and therefore reaches only the intentional abridgements of the right to vote. In dissent, Justice Marshall explicitly agreed that the provisions of Section 2 of the Act were congruent with the protection of the Fifteenth Amendment, but he concluded that proof of discriminatory impact was sufficient to secure relief under the Fifteenth Amendment. *Id.* at 105n.2. Justice Brennan agreed with Justice Marshall's interpretation of the Fifteenth Amendment, but no member of the Court explicitly disagreed with the conclusion that Section 2 had the same meaning as that Amendment. Justice Stewart's opinion concluded that the Fifteenth Amendment was satisfied wherever all races have access to the ballot, and that claims of "vote dilution" must be tested under the equal protection clause of the Fourteenth Amendment. Justices Stevens and Marshall explicitly disagreed, finding that dilution cases could also be brought under the Fifteenth Amendment. Justice Stewart concluded that there was insufficient evidence of discriminatory intent in the creation and maintenance of Mobile's form of government; he did not explicitly state that proof such intent would have sufficed to justify relier. Justices Brennan, White, and Marshall concluded in dissent that there was adequate proof of discriminatory intent, and that such intent justified the relief granted by the district court. Justice Blackmun joined in the reversal, even though he expressed some sympathy for the viewpoint of the dissenters, because he felt that the relief ordered by the district court was too drastic. Justice Stevens in his concurrence indicated that the question of intent in municipal government cases should be largely irrelevant. He concluded that so long as there was any rational justification for an at large form of government, it should be upheld by the courts, even though some of its supporters might have discriminatory motives.

VI. MUNICIPAL GOVERNMENTS UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS

Gomillion v. *Lightfoot*, 364 U.S. 339 (1960).

An act of the Alabama Legislature had redrawn the boundaries of the city of Tuskegee in such a way as to remove from the city almost all of the black voters without removing any of the white voters. Whereas the city had previously been in the form of a square, its new boundaries had twenty-eight sides over a much smaller area. In an opinion by Justice Frankfurter, the Court concluded this removal of black voters from the city denied them the right to vote in contravention of the Fifteenth Amendment. In a separate concurrence, Justice Whittaker held that the Fifteenth Amendment had not been violated, because all persons of every race were permitted to vote in the areas in which they resided. However, he found that the action violated the Fourteenth Amendment because blacks had been clearly segregated out of the city.

Beer v. *United States*, 425 U.S. 130 (1976).

Under the 1960 census, the city of New Orleans was governed by a council made up of five members elected from single member districts and two members elected at large. The 1970 census revealed that 45% of the city's population and 35% of its voters were nonwhite. The city submitted to the Attorney General a reapportionment plan which preserved the two at large seats, created two districts with black population majorities, and for the first time created one district with a black voter majority. The Attorney General and the district court rejected the plan because it would produce black representation on the council roughly proportional to black population in the city. The district court added that the city should abolish the two members elected at large. In an opinion by Justice Stewart, the Supreme Court reversed. The Court held that the district court had no authority under Section 5 of the Act to consider the existence of the at large seats, since those seats had been in existence prior to 1964. Moreover, the Court held that Section 5 prohibits only those voting changes which result in "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 141. Because this plan created more black majority districts than the plan that it replaced, it should have been approved under Section 5. Justices White, Marshall, and Brennan all dissented. They would have held that Section 5 prohibits the approval of a plan which does not result in an approximation of proportional representation where there is also evidence of bloc voting and certain bars to participation in the electoral process.

City of Mobile v. *Bolden* (See V above).

VII. LEGISLATIVE DISTRICTS UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS

Whitcomb v. *Chavis*, 403 U.S. 124 (1971).

In an opinion by Justice White, the Supreme Court held that multi-member state legislative districts are not necessarily unconstitutional. In dictum the Court states that multi-member districts in some circumstances might be proven to work as an unconstitutional dilution of the voting power of the minority voters within the district. In this case the Court found that minority voters had ample opportunity to participate in the selection of Democratic candidates, but that Republicans regularly defeated those candidates. The disadvantage to the minority voter was based not upon race, but upon partisan affiliation. Justices Douglas, Brennan, and Marshall dissented, finding that the dilution of the minority vote had already been proven to the district court. They also indicated that there was no need to prove discriminatory intent. In a separate dissent, Justice Harlan argued that the entire question of dilution could not be managed by the courts in a neutral and objective way, and concluded that the courts should stay out of reapportionment altogether.

White v. *Regester*, 412 U.S. 755 (1973).

In an opinion by Justice White, the Supreme Court affirmed a decision of a district court in Texas requiring that state legislators from Dallas and San Antonio be elected from single member districts rather that at large in their respective counties. This is the first and only case in which the Supreme Court has found that multi-member districts actually dilute the minority vote. In Dallas the Court emphasized that blacks did not have a fair opportunity to participate in the nominating process of the Democratic party. In San Antonio the Court emphasized that language and cultural barriers made it difficult for Mexican-Americans to have their views represented in a delegation elected at large.

United Jewish Organizations v. *Carey*, 430 U.S. 144 (1977).

This case involved the Attorney General's rejection of New York's 1972 legislative redistricting as it applied to Brooklyn, which is covered under the Act. The Attorney General originally ruled that there were an insufficient number of districts with non-white populations large enough that non-white candidates could win an election. The Attorney General indicated that a non-white population of 65% was necessary to create a safe non-white seat. In a new plan adopted in 1974, the Legislature met the objections of the Attorney General, but in so doing, divided a community of Hasidic Jews which had previously resided in a single district. The Attorney General approved the plan, but the Jews went to court claiming that they had been the victims of racial discrimination. The Supreme Court rejected their efforts, but was unable to produce a majority opinion. Justices Brennan, Blackmun, and Stevens joined an opinion by Justice White which held that the Legislature could legitimately use racial quotas in order to create a plan which would be acceptable under Section 5 of the Act. From the record made in the district court, it did not appear that the Legislature had done any more than comply with the requirement that minority voting strength not be decreased. Justices White, Stevens and Rehnquist went on to say that, even absent the requirements of the Act, the Constitution permits a state to draw lines in such a way that the percentage of non-white districts would approximate the percentage of non-whites in the population, so long as whites were in the population, so long as whites were likewise provided with fair representation. Justices Stewart and Powell rejected the argument that race consciousness is unconstitutional per se. They found this plan constitutional because there was no purpose of invidious discrimination. Chief Justice Burger dissented, finding that the use of a quota system in redistricting offended the Fifteenth Amendment and that an effort to require an effort to comply with the Voting Rights Act could not cure that infirmity.

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